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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cr. No. 01-20147-GV
	)	
CALVIN BELL,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS

Calvin Bell was indicted on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He is charged with knowingly possessing a Lorcin nine millimeter handgun after having been previously convicted of a felony. Bell seeks to suppress the gun which was retrieved by police officers during entry into his girlfriend's house. As grounds, he asserts the entry into the house was illegal and the gun was illegally seized in violation of his Fourth Amendment rights because the police did not have a warrant, consent, or exigent circumstances. United States District Court Judge Julia S. Gibbons referred Bell's motion to the undersigned United States Magistrate Judge for an evidentiary hearing and report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

An evidentiary hearing was held on May 22, 2002. During the hearing, the government called two witnesses, Detective Andre Woods

and Detective Felipe Boyce, both of whom are with the Memphis Police Department's Organized Crime Unit. The defense called Mrs. Madelyn Worles Bell, the defendant's wife, and also called Detective Felipe Boyce. For the reasons that follow, Bell's motion should be granted.

PROPOSED FINDINGS OF FACT

On or about March 2, 2001, Memphis Police Department's Organized Crime Unit ("OCU") received a call from an anonymous source, complaining of drug activity in a house at 742 North Bingham, Memphis, Tennessee. The caller advised that a dark-complected, twenty-five year-old black man weighing 215 pounds and six feet five inches tall with a flattop-fade haircut was selling large quantities of marijuana from the house at the Bingham Street address. The caller further described the suspect's car as a 1991 white, red and gray Dodge Extended Cab and told police that the man had a semiautomatic gun and that there were lookouts on the porch and on the street corner. According to the unidentified caller, the drug sales were conducted early in the morning and after dark, and people would drive up as well as enter the house to complete the drug sales. A complaint form containing the information about the suspect's description and other details provided by the caller was filled out by the secretary who answered the phone call.

The practice of the OCU with respect to such "mainline

complaints," as they are called, is for a lieutenant, in this case Lieutenant Williams, to decide on which complaints to follow up and then divide the complaints between the officer teams to be investigated. The complaint form regarding North Bingham indicates it was assigned for investigation by Lt. Williams on March 2, 2001, with a tentative return, or investigation date, of March 16, 2001. Detective Boyce testified that the complaint was assigned to his team sometime between the 2nd and the 19th of March, 2001. A team of police officers consisting of Detectives Woods, Boyce, and Crutchfield went to investigate the complaint on March 19, 2001.[1]

Detective Boyce testified that the three officers arrived at 742 North Bingham together in an unmarked police car which they parked on the street in front of the house and that all three were wearing white shirts bearing large black letters that stated "Organized Crime Unit - MPD" or words to that effect. In addition, all three officers were wearing their badges on the shirts and were carrying their guns in holsters.[2] Detectives Woods and Crutchfield

---

[1] According to the testimony of both detectives, two other officers, Bateman and Oliver, were later called to the North Bingham residence to transport Bell.

[2] In her testimony, Mrs. Bell claimed that she did not know who the people were that entered her home until, she alleges, they began to thoroughly search her house and utter abusive language toward her. She claims she did not notice anything written on the officers' shirts, nor did she see any badges. She does not dispute, however, that the officers were wearing guns in holsters.

went to the front of the house, while Detective Boyce went to the side and rear of the house in case anyone tried to flee from that door. Mrs. Bell testified that there were two cars parked in front of the house, one burgundy two-door hatchback car which she drove and her cousin's car. Detective Woods had no recollection of any cars being parked in front of the house or along side the house, and Detective Boyce offered no testimony on the issue.

Woods and Crutchfield stepped onto the front porch of the house, stopped and listened for noises inside the house. Woods heard nothing, walked to the door and knocked.[3] Calvin Bell asked "Who is it?", came to the door and cracked the door opened wide enough for his body to be exposed. According to Detective Woods, he replied "Police. I want to talk to you." Detective Woods testified that as he peered through the opening, he observed a chrome handgun in Bell's right hand which Bell quickly tossed behind him. At this point, Woods pushed the door opened, grabbed at Bell, tried to pull him out of the house, struggled a bit at the threshold, and then subdued him within the house. Detective Woods

[3] The door itself is somewhat of an issue. Mrs. Bell claims there was both a storm door and a wooden door on the house, and that the wooden door was ajar, but the storm door was closed. Woods testified that there was only one door, a wooden one, which was closed. This does little to affect the outcome of the Fourth Amendment analysis, however, as all witnesses agree that Bell opened the wood door voluntarily.

testified that after entering the house, he smelled marijuana and observed a black female sitting on the couch.

Meanwhile, Boyce heard the commotion at the front of the house and heard Woods shout something about a gun. When he arrived on the porch, Bell, Woods and Crutchfield were all standing inside the house, and Woods and Crutchfield were detaining Bell. Boyce handcuffed Bell while Woods went to the couch and retrieved a 9-millimeter semiautomatic handgun, lying next to the black female who was sitting on the couch. Before he patted Bell down, Boyce asked Bell if he had any weapons or drugs; Bell did not respond. Boyce patted him down and felt a large bulge in the front left pocket of Bell's pants. He pulled a large plastic bag containing many smaller bags of marijuana out of Bell's left front pocket. Woods then performed a "protective sweep" of the house to ensure there were no other people in the home. Woods noted that there was very little furniture in the house, only a couch and a mattress in the house. According to the detectives, two other officers, Bateman and Oliver, were then summoned to assist in transporting Bell down to the Criminal Justice Complex. Bell gave the officers his home address of 1607 South Parkway East, Memphis, Tennessee, which address is reflected on the arrest ticket.

The arrest ticket completed by Detective Boyce states:

Detectives went to the front door and was met [sic] by

> the defendant. The defendant let officers in the front door and at that time Detectives Wood and Crutchfield observed the defendant with a chrome handgun in his right hand. The defendant then threw the weapon onto a couch in the living room. After detaining the defendant, Detective Boyce did a "pat down" for officer safety....

Ex. 3. No mention of a marijuana odor was made on the arrest ticket by Detective Boyce.

As to the issues of the entry into the house, the location of the gun, and the protective sweep, Mrs. Bell testified that the detectives forced their way in when the door was opened, thoroughly searched the entire house and during the full-blown search of her house, found the gun in a box in a closet where she had stored it rather than on the couch. Mrs. Bell also testified, however, that she was in the process of moving out of the 742 North Bingham house and into another house with Bell.

The officer's testimony is more plausible on the issue of the location of the gun, particularly in light of the fact that Mrs. Bell had removed most of her belongings from the house. Thus, the court finds as fact that the gun was not found in a box in the closet as Mrs. Bell claims but was in fact in the possession of Bell when he answered the door. The entry in the house is a more difficult factual issue to resolve. Woods' testimony that he observed a gun in Bell's hand and pushed his way in is clearly inconsistent with Boyce's written report that Bell let the officers

in and thus undermines the credibility of both Woods and Boyce. Nevertheless, despite the inconsistency, the court finds the officers' testimony more believable than Mrs. Bell's, and therefore finds as fact that Woods pushed his way inside the house after observing Bell with a gun.

After the officers seized the gun, Mrs. Bell, who was seated on the couch, was also patted down and questioned. She told the detectives that she lived at the house, that the house belonged to her, and that Bell was her fiancé. No contraband was found on her person, and she was not arrested. Her name was later determined to be Madelyn Worles.

At some point after Bell's arrest, Madelyn Worles (Bell) signed a consent to search form that was filled out and witnessed by Detective Woods. Mrs. Bell testified that the detectives threatened to take her to jail if she did not sign the consent to search form. Woods denied conducting a full-blown search and initially denied obtaining Mrs. Bell's signature on a consent to search form. On rebuttal, when presented with the executed form, Detective Woods remembered having Mrs. Bell sign the consent form. He testified that he routinely attempts to get a consent to search form filled out even if no search has taken take place in order to prove to his superior officers that he actually investigated the complaints assigned to the team. As the government does not rely

on the consent to search form as establishing the legality of the detectives' entry into Mrs. Bell's home, the consent to search form and whether or not it was voluntarily signed is inconsequential to the Fourth Amendment analysis at hand except for impeachment purposes. Even though it is disturbing that the officers at first denied the existence of a consent to search, it does not change the court's analysis or its findings, particularly as to credibility of the officers.

PROPOSED CONCLUSIONS OF LAW

As an initial matter, the government asserts that Bell does not have standing to contest the officers' entry into the house because the house was actually his girlfriend's. Before this court may proceed with its analysis of the Fourth Amendment issues presented in this case, the standing issue must be resolved.

A. Standing

Bell asserts he has standing to contest the officers' entry at 742 North Bingham even though he did not own the house or continually reside there. Bell has the burden of showing that he has standing. *United States v. Sangiento-Miranda*, 859 F.2d 1501, 1510 (6th Cir. 1988).

The Supreme Court expressly rejected the "rubric of standing" as to violations of the Fourth Amendment over twenty years ago. *Minnesota v. Carter*, 119 S. Ct. 469, 472 (1998)(citing *Rakas v.*

Illinois, 439 U.S. 128, 143 (1978)). Instead, the proper inquiry is whether the defendant personally has an expectation of privacy in the place searched. *Id.* at 143-44. At the time Bell was arrested, his then-girlfriend and now wife, Madelyn Worles Bell, rented the home at 742 North Bingham. Mrs. Bell testified at the hearing that although Bell had another residence that he shared with his mother on South Parkway, he stayed overnight at her house three to four nights a week. She testified that Bell had a key to the house, kept some of his clothes there, and took care of her two sons when she was away.

The government submitted little evidence to rebut Mrs. Bell's testimony other than the fact that Bell gave the police his address on South Parkway when the officers asked for his home address to put on the arrest ticket. This evidence does little to undermine Mrs. Bell's testimony regarding Bell's frequent stays at her home. A temporary resident or occasional overnight guest may have a reasonable expectation of privacy. *Minnesota v. Olson*, 495 U.S. 91 (1990). The court submits therefore that Bell had a reasonable expectation of privacy at 742 North Bingham and has met his burden of proving "standing" and that he may assert his Fourth Amendment rights with respect to the gun recovered at Mrs. Bell's residence.

B. The Entry Into the House

The Fourth Amendment provides that "the right of the people to

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation . . . ." U.S. Const. amend. IV. This amendment exists to ensure the inviolability of an individual's home. *United States v. Nelson*, 459 F. 2d 884, 885 (6th Cir. 1972). The Supreme Court has long recognized the age-old adage that "a man's home is his castle," and specifically that such a right to be secure from intrusion in that castle is embodied in the Fourth Amendment. *Minnesota v. Carter,* 525 U.S. 83, 94 (1998)(Scalia, J., concurring). As stated by Mr. Justice Stewart in his opinion for the Court in *Coolidge v. New Hampshire*, 403 U.S. 443, (1971):

> **Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The exceptions are 'jealously and carefully drawn,' *Jones v. United States*, 357 U.S. 493, 499 (1958), and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' *McDonald v. United States*, 335 U.S. 451, 456(1948). '[T]he burden is on those seeking the exemption to show the need for it.' *United States v. Jeffers*, 342 U.S. 48, 51 (1951).**

***U. S. v. Nelson*, 459 F.2d at 888 (citing *Coolidge v. New Hampshire*, *supra* at 454-55). The Supreme Court made clear in *Payton v. New York*, 445 U.S. 573, 590 (1980):**

> **In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed with out a warrant.**

Id.

Thus, to justify crossing the threshold of a house where Bell had a rightful expectation of privacy, the government must show that the police either had a warrant or probable cause and exigent circumstances.[4] Clearly the officers did not have a warrant. Because Bell has alleged that the detectives' intrusion of his home was warrantless, the burden is on the government to show that there was an exception to the warrant requirement to support the entry and seizure. WAYNE R. LAFAVE, § 11.2(b) SEARCH AND SEIZURE 38 (3d Ed. 1996).

In its written response to the motion to suppress, the government relied primarily on the "plain view" doctrine. To invoke the plain view exception to the search warrant requirement in the Sixth Circuit, the government must show two things. First, it must show that the police officers were "lawfully . . . in an area from which the object is plainly visible." *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir. 1996)(citing *United*

---

[4] **Although a consent to search form was signed by Mrs. Bell, the government does not rely on it to demonstrate legal access to the home.**

States v. Blakeney, 942 F.2d 1001, 1028 (6th Cir. 1991)*; see also United States v. Morgan*, 743 F.2d 1158, 1167(6th Cir. 1984). Second, the incriminating character of the evidence must be "immediately apparent." *Horton v. California*, 496 U.S. 128, 136-37 (1990)*; see also Morgan,* 743 F.2d at 1167.

In the present case, the police officers were lawfully on the porch of Mrs. Bell's house when Bell answered the door with the gun in his hand.[5] At that point, the officers had not yet entered the house. As such, the observations made by the officers were not in violation of Bell's Fourth Amendment rights. Bell answered the door in response to officers' knocks and opened it wide enough so that the officers could see the gun in his hand. A person standing in the doorway of a home is as "exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." *United States v. Santana*, 427 U.S. 38, 42 (1976).

The "plain view" exception based on the detectives' observations of a gun from the porch alone, however, cannot support the officers' crossing the house's threshold to detain and arrest Bell. The mere possession of a gun in one's own home, or a home in which one has a legitimate expectation of privacy, is not immediately incriminating. *United States v. Killebrew*, 560 F.2d

---

[5] See discussion *infra* at p. 21 on the "knock and talk" strategy.

729, 734 (6th Cir. 1977)(when there is no other evidence defendant is dangerous or about to flee, mere possession of a gun is not enough to justify warrantless entry into a place where defendant has Fourth Amendment protection). In addition, "plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search absent 'exigent circumstances.'" *Morgan*, 743 F.2d at 1167.

In support of its "plain view" argument, the government relies heavily on *United States v. Morton*, 17 F.3d 911 (6th Cir. 1994). In *Morton*, police had received reports that stolen merchandise was being stored at an auto mechanic's shop. *Morton,* 17 F.3d at 912-13. The police went to the shop which was open for business and walked into the reception area where two men were seated. The officers had their guns drawn, identified themselves as police officers and stated that they were looking for stolen clothes dryers. *Id.* at 913. The defendant stood up from his seat in the reception area, exposing the butt of a pistol protruding from his back pocket. The district court denied the defendant's motion to suppress the gun, ruling that the officers lawfully entered the shop which was open to the public for business and the officers' plain view observation of the gun coupled with information on stolen items gave the officers reasonable suspicion to detain the

defendant and seize the gun to determine whether the defendant lawfully possessed the weapon. *Id.* The Sixth Circuit affirmed the district court's holding, stating that the officers' actions did not violate the Fourth Amendment. *Id.*

***Morton* is not controlling. The one pivotal difference between *Morton* and the case at bar is that the officers in *Morton* entered and detained the defendant in a place of business, open to the public where customers and other members of the public had a right to be during business hours. In the instant case, Bell was detained *inside* a private residence. "The 'plain view' doctrine does not authorize warrantless entries into a private home merely because an item of contraband has become visible to those outside." *Morgan*, 743 F.2d at 1167.**

At the suppression hearing and as articulated in closing arguments, the government also relied on exigent circumstance created by Bell's actions to justify the officer's entry into the house without a warrant. Traditional exigent circumstances can be generally grouped into four categories: (1) evidence is in immediate danger of destruction, *see Schmerber v. California*, 384 U.S. 757, 761-77 (1966); (2) an immediate threat to the safety of law enforcement officers or the general public exists, *see Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); (3) the police are in hot pursuit of a suspect, *see generally Welsh v. Wisconsin*, 466 U.S.

740, 753 (1984); or (4) the suspect may flee before the officer can obtain a warrant, *see Minnesota v. Olson*, 495 U.S. 91, 100 (1990). *See also United States v. Saari*, 272 F.3d 804, 811-812 (6th Cir. 2001)(summarizing exigent circumstances). The government relies on the safety exigency, the second listed exigent circumstance, to justify the warrantless entry into the house. The government argues that while the officers were lawfully standing on the porch of the house, they observed Bell throw a gun behind him, causing the officers to fear for their safety.

In support of its exigent circumstances argument, the government cites to two cases, one from the Eleventh Circuit and one from the Eighth Circuit. In the Eleventh Circuit case, *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991), federal agents were conducting a stake-out in a residential neighborhood in Miami. *Tobin*, 923 F.2d at 1508. At a house unrelated to their surveillance, a car stopped and backed into the driveway. The driver of the car and the occupant of the house unloaded tubular plastic bags that appeared to contain smaller bags from the trunk of the car. *Id.* Suspecting the bags contained cocaine, the agents decided to interview the occupants of the house. Two agents walked up to the house and knocked; a third agent stood in the driveway next to the garage. After several minutes, the front door opened. The agent at the door identified himself and proceeded to ask the

occupant questions about the actions that had transpired minutes ago in his garage. The agent at the door could smell marijuana. The agent suggested that perhaps they should all go to the garage and see for themselves. The occupant turned and walked into the house and the agent followed, asking him to open the outside door to the garage, which he did. *Id.* From the driveway, the other agents could see the tubular bags, one of which was open, exposing the cocaine contained in the bag. The agents then arrested both men and conducted a security sweep of the house, discovering three bales of marijuana in the process.

The Eleventh Circuit affirmed the district court's denial of the defendants' suppression motion. *Id.* at 1511. The Eleventh Circuit panel that initially decided the motion reasoned that the agents' initial observations from their surveillance point gave them reasonable suspicion that criminal activity was afoot, *id.*, and once the door of the house opened and the agent smelled marijuana, probable cause existed to cross the threshold of the home. On *en banc* review, the entire panel determined that the agents actually had probable cause to search the house even prior to approaching the house based on their earlier observations. The court further opined that the presence of three cars outside the house along with the odor of marijuana indicated that contraband was present and created an exigent circumstance, an exception to

the warrant requirement, in that the occupants of the house could destroy or escape with the marijuana while the agents obtained a search warrant. *Id.* at 1512.

In *United States v. Lucht,* 18 F.3d 541, 548-49 (8th Cir. 1994), defendants sought to suppress evidence obtained by police officers with a search warrant but without following the "knock and announce" procedure set forth in 18 U.S.C. § 3109. In *Lucht*, the government relief on the exigency that evidence could be destroyed. This standard is far different from the one the government must surmount in the case at bar, as the officers in the "knock and announce" situation already had a warrant to search the premises. Once the defendant provided sufficient evidence that the officers did not comply with the rule, the government only had the burden of showing that the officer's failure to knock and announce was reasonable under the Fourth Amendment or exigent circumstances existed so that compliance with § 3109 was not feasible. *United States v. Bates,* 84 F.3d 790, 794 (6th Cir. 1996).

***Tobin* and *Lucht* are not similar enough to the present case to be persuasive. "In order to vindicate a warrantless search by proving exigent circumstances, the government must also show probable cause." *United States v. Jones*, 239 F.3d 716, (5th Cir. 2001)(citing *United States v. Vega*, 221 F.3d 789, 798 (5th Cir. 2000). *See also United States v. Davis*, 2002 U.S. App. LEXIS 9411**

(10th Cir. May 16, 2002) ("Probable cause accompanied by exigent circumstances will excuse the absence of a warrant.") and *United States v. Tobin*, 923 F.2d 1506, 1510 11th Cir. 1991)("A warrantless search is allowed, however, where both probable cause and exigent circumstances exist.") In both *Tobin* and *Lucht*, the officers clearly had probable cause to believe that contraband or evidence of a crime would be found in the residences, even before approaching the houses.[6] In *Tobin*, the Eleventh Circuit expressly determined that the officers had probable cause to search the house even prior to their approach to the house based on the officers' observations of the defendants' furtive behavior and transfer of tubular bags containing smaller bundles from the car to the garage. In *Lucht*, the officers had a search warrant based on probable cause.

In the scenario presented by Bell's situation, unlike the ones in *Tobin* and *Lucht,* the officers did not have probable cause to search the home before Bell opened the door even if an exigency existed, which this court does not believe it did.[7] Probable cause exists when under the "totality-of-the-circumstances . . . there is

---

[6] **Plus, the exigency in both *Tobin* and *Lucht* was that contraband would be destroyed while in the present case the exigency argued by the government is officer safety.**

[7] ***See* discussion *infra* pp. 32-33.**

a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Before Bell opened the door, the officers here had, at best, a mere suspicion of criminal activity, not necessarily even a reasonable suspicion, based on an anonymous informant's tip. For suspicion to rise to the level of reasonableness, one must have "specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress." *McPherson v. Kelsey,* 125 f.3d 989, 993 (6th Cir. 1997).

The Fifth Circuit has ruled on a case, *United States v. Jones*, 239 F.3d 716, 719 (5th Cir. 2001), that is nearly factually identical to this case. As in the present case, the police in *Jones* received a complaint of drug activity at a certain address and went there to investigate. As the officers approached the apartment, a woman walking from the apartment complex claimed she had bought drugs from the same apartment the officers had come to investigate. The officer in charge did not think he had probable cause to obtain a search warrant at that time and therefore he decided to simply knock on the apartment door and talk to the occupants in furtherance of his investigation. The door to the apartment was slightly open but its screen door was closed, allowing the officers to see the interior of the apartment. *Id.* After the officer announced his presence, he saw defendant Jones

standing with his back to the door in the kitchen area and a handgun resting on the kitchen table nearby. Another man was seated on a couch. Jones came to the doorway, unlocked the screen door and began to talk to the police. The officer promptly walked into the apartment, retrieved the gun, and upon learning that Jones was a prior felon, placed Jones under arrest. *Id.*

Jones filed a motion to suppress, arguing, *inter alia*, that the officer's entry into his apartment was unreasonable under the Fourth Amendment. The district court denied his motion, finding that exigent circumstances existed which reasonably put the officer in fear for his safety and that of his fellow officers. *Id.* The trial court observed that an officer's own action cannot be the cause of an exigent circumstance. The Fifth Circuit affirmed the district court's ruling. *Id.* at 720. It first noted that the officer's "knock and talk" strategy was widely recognized as an accepted investigative tactic when criminal activity is reasonably suspected. *Id.* at 720-21; *see Tobin,* 923 F.2d 1506, 1511 (11th Cir. 1991); *United States v. Hardeman*, 36 F. Supp. 2d 770, 777 (E.D. Mich. 1999). The Fifth Circuit then found that Jones himself caused the exigent circumstances by leaving the gun in plain view in his apartment with the door open. He lowered his expectation of privacy through his actions and the officer's concern for safety was reasonable, as the gun was easily within arm's reach. *Id.* at

722.

The factual scenario here is only slightly different from *Jones*. Rather than observing a gun resting on a table in the kitchen a short distance from the defendant, the officers in the present case observed Bell immediately toss the gun behind him into the recesses of the house as soon as he realized that the people on his porch were the police. The critical difference, however, between *Jones* and the present case is that the statement by the woman in *Jones* claiming to have bought drugs at the very apartment under scrutiny was sufficient to establish probable cause that criminal activity was presently taking place in the apartment, whereas in present case the police only possessed unsubstantiated rumors from an anonymous complaint that at best, coupled with their investigation, created a reasonable suspicion of criminal activity.

Another Eighth Circuit case sheds some light on the legality of the officers' entry into 742 North Bingham. In *United States v. Hill*, federal agents had a search warrant for the fields and barn of a farm to find marijuana, but not a warrant to search the actual farmhouse. *Hill*, 730 F.2d 1163, 1169 (8th Cir. 1984). When the agents approached the house, defendant Frazier came out of the house through a sliding glass door to meet them. The agents identified themselves and asked if anyone else was the in house, to which Frazier replied, "Ted." The agents told Frazier to call Ted

out of the house. When he hesitated, one agent walked to the door and called out for the other defendant, who responded. The agent looked through the glass door and saw a gun sitting on a bookcase next to the door. *Id.* at 1170. He then entered the house, retrieved the gun and observed marijuana and other weapons lying about the room. The agents arrested both men and conducted a search of the house. The Eighth Circuit found that the officers fear for their safety after seeing the weapon in plain view from the outside of the house created an exigent circumstance sufficient to justify their entry into the home for the officer's safety during the execution of a search warrant on the surrounding premises. *Id.*

Similarly, just as the agents in *Hill* had a right to be in the defendants' yard pursuant to a search warrant when they saw the gun, the police officers were lawfully on Bell's porch when he opened the door with a gun in his hand. The gun was in plain view to the officers in *Hill*, where they were already looking for drugs outside the house and suspected that there might be weapons. The one critical difference, however, is that the officers in *Hill* already possessed a search warrant for the surrounding premises based on probable cause, whereas in the present case, all the officers had was an anonymous complaint called in to police on March 2, 2001 describing drug activity at the house and the

presence of a weapon.

To sustain the entry under the government's theory, the situation at 742 North Bingham would have had to simultaneously create probable cause and exigent circumstances when Bell opened the door. Under the government's theory, when Bell furtively threw the gun behind him when he saw police on his doorstep, his suspicious behavior coupled with the partially corroborated anonymous tip was enough to create probable cause and exigent circumstances by potentially endangering the lives of the detectives on the doorstep.

To determine if probable cause ever developed, the anonymous tip must be examined. The Supreme Court made clear in *Alabama v. White*, 496 U.S. 325 (1990), that information from an anonymous informant that exhibits sufficient reliability can provide reasonable suspicion. *White*, 496 U.S. at 326-27. Reasonable suspicion depends both on the content of the information provided by the anonymous informant and its degree of reliability. *Id.* at 330. Both factors - the quantity of the information and the quality - are taken into consideration as part of the totality of the circumstances in evaluating reasonable suspicion. *Id.* As the Supreme Court recognized, "In contrast to informants the police have dealt with face to face, anonymous tips generally fail to demonstrate the informant's basis of knowledge and/or independent

veracity sufficient to provide reasonable suspicion necessary for an investigatory stop." *White*, 496 U.S. at 330.

***White* involved an anonymous phone call tip that defendant would leave an apartment at a particular time driving a vehicle that the caller carefully described and would be going to a named hotel and would have cocaine in her possession. Although the tip itself lacked sufficient indicia of reliability, the Supreme Court, applying the totality of the circumstances test, found the tip supported a reasonable suspicion because it was corroborated when the events happened as predicted, indicating some basis of inside information, coupled with the police officers' own investigation conducted by following the car. *Id.* at 332.**

Another anonymous tip case, *Florida v. J.L.*, 529 U.S. 266 (2000), involved an anonymous phone tip that a black male wearing a plaid shirt would be at a specified bus stop and had a gun. Upon reaching the area, the patrol officers responding to the call observed three black men at the bus stop. The three men did not brandish a weapon or behave in a suspicious manner. One of the men, however, was wearing a plaid shirt, so the police stopped him and frisked him. The officers found a gun in the defendant's pocket and charged him with carrying a concealed weapon without a license and possession of a firearm while under 18 years of age. *J.L.*, 529 U.S. at 266.

The Florida trial court granted defendant's motion to suppress. The intermediate court of appeals reversed the trial court's decision, but the Florida Supreme Court quashed the appeals court's decision and declared the search to be in violation of the defendant's Fourth Amendment rights. The Supreme Court granted *certiorari* and affirmed the Florida Supreme Court's ruling. The Court held that officers could not conduct a *Terry* stop on someone based solely on an anonymous tip regarding verifiable facts of the appearance, clothing and location of a man who reportedly possesses a weapon. *Id.* at 274. The Court further noted that the tip provided no predictive information or "indicia of reliability" present in *White* and the police had no way to verify the presence or absence of the gun. A *per se* firearm exception to reasonable suspicion justifying a *Terry* stop would be too invasive of a person's privacy, the Court found, and would overstep the bounds of the Fourth Amendment. *Id.* at 272*; see also Commonwealth v. Grinkley*, 1997 WL 768616 (Mass. App. Ct. 1997)(phone call tip from woman who identified herself that black youths by tennis court in public park had a gun did not establish reasonable suspicion to stop and frisk defendant).

The case at bar differs sufficiently from the facts of *J.L.* to establish reasonable suspicion based on the tip coupled with police observations. The information provided by the anonymous caller in

the present case described five specific details: (1) black male approximately 6'5" tall and weighing 215 pounds with a flat-top fade haircut; (2) 742 North Bingham; (3) lookouts on the porch (4) 1991 white, red and gray Dodge Extend Cab and (5) semiautomatic gun. At least three of the particulars of the tip - the address, the description of the man at the house, and the semiautomatic weapon - were verified by the police officers' visual observation of the defendant prior to entering the house. Unlike the tip in *J.L.*, the officers were able to establish with certainty that Bell had a gun, as he came to the door armed. The officers, however, could not remember what, if any, car was parked in front of the house, and there were no lookouts present, contrary to the tip's information. The anonymous tip to police, while it did not predict future events, combined with the police observing Bell's possession of a gun and Bell's suspicious action of throwing the gun, gave police a reasonable suspicion to conduct a *Terry* stop and frisk of Bell, but not necessarily probable cause.[8]

---

[8] **The court questions the "staleness" of information provided on March 2, 2001 describing drug sales, when the complaint was not investigated until March 19, 2001. *See United States v. Payne*, 181 F.3d 781 (6th Cir. 1999)(explaining that drug tips grow stale quickly, and when a partially corroborated tip was acted upon over a month after it was originally made, reasonable suspicion of criminal activity did not exist). Because this issue was not addressed at the hearing, the court makes no ruling in this regard.**

Therefore, at best, reasonable suspicion arose when Bell threw the gun behind him, as it suggested that he had something to hide once he saw that the men at his door were the police.

Thus, the only basis upon which to justify the officers' entry into the house to seize the gun from Bell is a *Terry* stop. 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). "*Terry* permits police officers to frisk suspected criminals in public." *United States v. Kinney*, 638 F.2d 941, 945 (6th Cir. 1981)(stating that where defendant was arrested on the porch of his home pursuant to an arrest warrant, there was no need in searching the home because no one else in the home was armed or dangerous).

A *Terry* pat-down, coupled with the Supreme Court case of *United States v. Santana*, 427 U.S. 38 (1976), provides the most support for the officers' actions.[9] In *Santana*, an undercover officer bought heroin from a drug dealer. The officer drove the dealer to defendant's home, whereupon the dealer took the money from the agent and went into the home. The dealer then came back out to the car with heroin, which she gave to the undercover

---

[9] **A *Terry* stop is also more in line with the arrest ticket filled out that day by the officers than the arguments presented by the government at the hearing. *See supra* p. 6.**

officer. *Id.* at 40. The officer them arrested the dealer and walked up to the home, where defendant was standing in the doorway of the house. She dropped two packs of heroin on the ground as she stood in the doorway, pulling away from the police officers' grasps, then tried to retreat into her home. *Id.* The police followed her into her home and arrested the defendant. The trial court suppressed the evidence found in the defendant's home as fruit of an illegal search. *Id.* at 41. On appeal, the Third Circuit upheld the suppression of the evidence without opinion. *Id.* at 42. The Supreme Court reversed. In an opinion by Chief Justice Rehnquist, the court stated that Santana was positioned in the doorway, voluntarily exposing herself to all within view and hearing. *Id.* Hence, she had no expectation of privacy and was in fact in a public place for purposes of the Fourth Amendment. The court further held that her subsequent retreat into the home was ineffective to make the arrest illegal, as "a suspect may not defeat an arrest which has been set in motion in a public place." *Santana*, 427 U.S. at 43.

The most striking difference between *Santana* and the case at bar is a factual comparison of what transpired in the doorway. Santana dropped packets of heroin in the doorway as the police approached her, clearly an incriminating factual circumstance. In the instant case, Bell simply threw his gun behind him. The police

had information from a controlled buy of heroin in *Santana*, with the dealer admitting that Santana's house contained the drug money from the buy. Here, no such evidence was available to the officers as they stood on the porch. They had an anonymous citizen's complaint and a few corroborated facts, but nothing more. Finally, the Supreme Court found that the police in *Santana* had probable cause to arrest the defendant before she retreated into the home. In contrast, no more than reasonable suspicion was present in the case at bar.

In *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), the Sixth Circuit briefly spoke to the issue of *Terry* pat-downs in the context of a home.[10] In *Morgan*, the Sheriff's Department of Morgan County, Tennessee received a complaint regarding target shooting at a public park called Potter's Falls. Two officers went to investigate and saw a group of people including the defendant loading weapons into the trunk of a car. *Id.* at 1160. One of the sheriffs told the men that someone had complained to them regarding

---

[10] The Sixth Circuit also touched on the issue in *Saari*. The court noted, "if the Court accepted the Government's legal argument, it would have the effect of providing lesser protection to individuals in their homes when the police do not have probable cause to arrest." *United States v. Saari*, 272 F.3d 804, 809 (6th Cir. 2001). The court further found that the Supreme Court's holding in *Payton* that "warrantless seizures of persons in their homes violate the Fourth Amendment, . . . applies to this case regardless of whether the officers at issue were conducting an arrest or an investigatory detention." *Saari*, 272 F.3d at 809.

target shooting and asked them to leave the park. One sheriff said to the other that they should look in the trunk but when they turned around, the trunk was shut. An unknown bystander walked up to the officers and told them that the trunk was filled with several different types of guns, including machine guns, and that the group had previously commented that they would shoot any law enforcement that tried to arrest them. *Id.* Based on this information, one of the officers radioed an alert to be on the lookout for the car that the group was driving.

Soon thereafter, another officer saw the car and followed it to the home of defendant Morgan. The officer notified the other officers of the car's location and continued to observe the house, where he witnessed no unusual activity. Ten officers then arrived at the Morgan home, surrounded the house, turned floodlights on the house and, using a bullhorn, ordered Morgan to come out. *Id.* at 1161. Morgan came to the door armed with a pistol. An officer ordered him to put down the gun. Morgan raised the gun, to which the officer responded by again ordering Morgan to put the gun down. Morgan then dropped the gun inside the house and walked outside. When he emerged from the house, the officers arrested him and removed another pistol from Morgan's back pocket. *Id.* The officers then ordered the others in the house to come out, which they did, and an officer walked into the house to retrieve the gun

Morgan had dropped. The officers then searched the rest of the house and found many weapons. *Id.*

Morgan moved to suppress the guns seized during his arrest. The district court granted the motion and the government appealed the case to the Sixth Circuit. *Id.* The Sixth Circuit affirmed the district court's holding, stating that no exigent circumstances existed to justify the warrantless entry of Morgan's home. *Id.* The court further reasoned that there was no need for an investigatory detention of Morgan, pursuant to *Terry*, as he was holding a weapon when he came to the door but was peaceful and up to that point had not made threatening gestures with the gun directed at the police. *Id.* at 1164. The court noted that even at his doorway Morgan still was entitled to some Fourth Amendment protection from intrusion into his home even if only reasonable suspicion existed. *Id.* at 1164 n.1. The court further opined that the "plain view" doctrine alone cannot justify the warrantless entry of a home to seize the item of contraband.

The holding in *Morgan* makes clear that the "firm line" drawn at the doorway to a home by the Fourth Amendment[11] is not to be taken lightly. *Morgan* persuades the court that although Bell came to the door with a gun and then threw it down, he was still

---

[11] ***See Payton v. New York*, 445 U.S. 573, 590 (1980).**

protected by the Fourth Amendment, the gun was not immediately incriminating, and he did not pose a threat to officer safety.

The facts show that Bell acted suspiciously when he saw the officers at his door by throwing the gun in his hand behind him into the home. This act alone, however, did not create a safety exigency. The officers testified at the evidentiary hearing that they could not remember if there was more than one car outside the house nor could they describe what kind of car, if any, was parked in front of the house; therefore they had no reason to believe that anyone else was in the home who would pick up the gun or otherwise pose a threat to them. Because Bell threw the gun away from him, the officers had no further reason to believe they were in imminent danger as he was no longer armed. Bell was peaceful and cooperative as he opened the door, and he made no threatening gestures with the gun. Nor did the officers have any prior knowledge that Bell might be dangerous or that he was a prior convicted felon.

The court is aware, however, of the dangers that police officers must face every day. Sometimes out of an abundance of caution, police may overstep the bounds of the Fourth Amendment rights of others while rightfully protecting their lives and the lives of innocent bystanders from what they perceive to be imminent danger. This court is nevertheless bound by precedent and the

Fourth Amendment jurisprudence in this area makes clear that under the definitions created by the judiciary, no exigency existed that would allow the police both to cross the threshold of the house and be able to use the evidence seized against Bell at trial.

Because there were no exigent circumstances, the officers did not have a right to enter the residence to detain Bell and conduct a *Terry* pat-down even though Bell freely exposed himself to the public when he stepped into the doorway before the police officers. Contraband in plain view alone is not enough to justify a defendant's seizure within his home, see *Morgan*, *supra,* the gun was not clearly contraband, and based on the facts, the officers' safety was not a concern. Only after he was patted down did the police discover drugs in Bell's pocket and determine that Bell was a felon and was illegally possessing a firearm, which gave the officers probable cause to arrest him. This arrest was not legal, as it was conducted subsequent to a violation of Bell's Fourth Amendment rights.

RECOMMENDATION

It is therefore recommended for the reasons above that Bell's motion to suppress the gun seized at 742 North Bingham be granted.

Respectfully submitted,

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

Date: June 26, 2002

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

ANY PARTY OBJECTING TO THIS REPORT MUST MAKE ARRANGEMENTS FOR A TRANSCRIPT OF THE HEARING TO BE PREPARED.