UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 99-56-P-H***
	)	
HAROLD W. NOBLE, JR.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Harold W. Noble, Jr., indicted on counts of conspiring to possess and aiding and abetting in the possession of heroin with an intent to distribute the same in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2, seeks to suppress evidence acquired during and following the stop of a car in which he was travelling on Route 95 near York, Maine on March 9, 1999. Indictment (Docket No. 1); Defendants' [sic] Motion To Suppress Evidence, etc. (Docket No. 8). On November 4, 1999 I presided over an evidentiary hearing at which the defendant appeared with counsel. At defense counsel's request I permitted post-hearing briefing on the narrow issue of the defendant's standing to challenge the seizure of evidence from the person of co-defendant Christopher Mazzillo. The defendant submitted a supplemental brief. Defendants' [sic] Supplemental Memorandum of Law, etc. ("Supplemental Memorandum") (Docket No. 11).

I now recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On March 8, 1999 Patrick Mazzillo appeared at the Biddeford Police Station in Biddeford, Maine and asked to speak to Detective Gagne, to whom he had on previous occasions provided confidential information regarding alleged criminal activity. Gagne referred Patrick[1] to Detective Phillip Greenwood. Greenwood had never before met or heard of Patrick; however, Gagne apprised Greenwood that Patrick had a track record as a reliable confidential informant, having previously provided information to the Biddeford Police Department that had led to arrests and convictions.

Patrick explained to Greenwood that he had come that day to provide information regarding his brother Christopher, who had angered him by facilitating the repossession of Patrick's car. Patrick told Greenwood that Christopher, a heroin addict, had been travelling to Lawrence, Massachusetts almost daily to pick up heroin, some for his own use and some for distribution to a customer in Portland named "Patricia," whose phone number Patrick provided.[2] Because Christopher's driver's license was suspended, he normally relied on his friend Harry Noble to drive. Noble, who knew the purpose of the trips, would be paid with a bag of heroin. Christopher and Noble usually made these trips in a 1991 red Geo; however, Christopher owned other vehicles, including a black Chevrolet Camaro IROC. The pair would take Route 95 south from Maine into Massachusetts, Route 495 south to Exit 46, and then proceed to Ozzy's Pizza in Lawrence. En route to Lawrence Christopher would page his supplier, either "Danny" or "Yamu," entering a code

[1]For ease of reference, I shall refer to Patrick Mazzillo as "Patrick" and Christopher Mazzillo as "Christopher."

[2]Greenwood learned from Gagne that Patrick also had a history of heroin use. Patrick was not at that time subject to any federal charges of which Greenwood was aware.

number that corresponded to the amount of heroin to be bought. Upon arrival Christopher would again page the supplier, signalling his presence at Ozzy's. The supplier would appear with three to six bundles of heroin, which Christopher would secret in his sock or shoe and occasionally in the watch pocket of his pants.[3] Christopher and Noble would then return to Maine.

After the interview Greenwood ran motor-vehicles checks verifying that a black Chevrolet IROC, license plate RKNIROC, was registered to Christopher and that Christopher's driver's license was suspended. He also looked up the phone number given for "Patricia." The following day, in mid- to late morning, Patrick again came to the police station to see Greenwood, disclosing that he expected Christopher to make a trip to Lawrence that day to pick up heroin. He said that because the Geo had been repossessed that morning, he expected Christopher to use the IROC. Patrick made a brief phone call from the police station, purportedly to Christopher, after which he suggested that the police be on the lookout for the IROC heading south on Route 95 because Christopher intended to make a heroin run that day if he could gather enough money to do so.[4]

Greenwood and another detective drove to a location in Biddeford where they expected the IROC to be parked. It was not there. At about 1 p.m. Greenwood telephoned Special Agent William Deetjen of the Maine Drug Enforcement Agency ("MDEA") to pass along the information that he had gathered concerning Christopher and Noble (including that concerning Patrick's motive). Deetjen had no personal knowledge concerning Patrick or his reliability as an informant. By running the phone number given for "Patricia" through a "Fast Track" computer program, Deetjen was able

[3]A "bundle" consists of 10 bags.

[4]Greenwood was present in the room during the phone call but acknowledged that he did not monitor, record or even listen carefully to it and thus he did not know whether Patrick was in fact talking to Christopher.

to identify Patricia Maiarano of Portland as Christopher's alleged heroin customer. Deetjen had personal knowledge that Maiarano had, at least as of five or six years previously, been a heroin user. He also phoned a fellow MDEA agent in Portland who confirmed that Maiarano continued to be suspected of involvement in heroin dealings. Deetjen placed three calls — to the Maine State Police ("MSP"), toll-booth personnel in York, Maine and United States Drug Enforcement Agency ("DEA") Agent Todd Prough of the Massachusetts-based Cross Borders Initiative ("CBI") — to alert each to be on the lookout for a black Chevrolet IROC with the license plate RKNIROC. Prough's mission, in his two years with the CBI, had been to stem the flow of drugs from Lowell and Lawrence, Massachusetts, into Maine, New Hampshire and Vermont. Lowell and Lawrence, in Prough's view, were known source cities of heroin, crack and cocaine for distribution to the three northern New England states.

At approximately 2 p.m. toll-booth personnel informed Deetjen that the IROC had just driven south through the York toll booth. Deetjen notified the MSP and Prough, after which he and MDEA Agent Gerard Hamilton positioned themselves in separate vehicles alongside Route 95 north in the vicinity of the York tollbooth to await the return of the IROC, remaining in close radio or cellular-phone contact with the MSP and Prough. Prough and other DEA agents established surveillance of every Lawrence exit from Route 495 south. When Prough became concerned that no one had yet spotted the IROC within the expected time frame (the drive time from the York toll booth to Lawrence being approximately thirty-five minutes), he and his partner positioned their vehicle so that they could observe both northbound and southbound traffic. At approximately 3:15 p.m. Prough spotted the IROC with two occupants heading north on Route 495 near Haverhill, Massachusetts — the next town north of Lawrence. Prough notified the MDEA and followed the IROC north to the

York toll booth.

At approximately 3:50 p.m. the IROC drove northbound through the York toll booth. It was promptly pulled over by two marked MSP cars, blue lights flashing. At least four other unmarked law-enforcement vehicles, including those of Deetjen, Hamilton and Prough, converged behind the IROC and MSP cars, and their occupants walked toward the IROC. Both Christopher, the passenger, and Noble, the driver, had gotten out of the IROC, and each was standing alongside the car talking to a uniformed MSP trooper. The troopers did not have guns drawn, nor was either suspect handcuffed at that time. Deetjen and Hamilton, who were wearing jackets identifying themselves as members of the MDEA, approached Christopher. Deetjen identified himself and asked Christopher where he had been; Christopher replied that he was coming from New Hampshire and twice denied having been in Massachusetts. Deetjen began to reach into Christopher's watch pocket. Christopher asked him what he was looking for, and Deetjen replied, "heroin."[5] Christopher acknowledged that he might have a couple of bags in his watch pocket, whereupon Deetjen resumed the search and found none. Christopher then directed the MDEA agents to look in his shirt pocket. Hamilton did so and retrieved several clear bags containing a substance that Deetjen suspected to be heroin. Deetjen conveyed this information to the MSP trooper who was talking to Noble, and both Christopher and Noble were handcuffed and placed under arrest. Deetjen did not consider either Noble or Christopher, prior to the arrests, to have been free to leave. Had Noble attempted to flee during the initial questioning, he would have been stopped. Subsequent to the arrests, an additional forty-five bags were seized from Christopher's shoe. In all, forty-nine bags containing

[5]Deetjen acknowledged that he was not performing a safety check when reaching into Christopher's watch pocket and was not concerned that either Christopher or Noble was armed.

a substance suspected to be heroin were retrieved. Also following the arrests, certain items were seized from Noble, including a pager from which phone numbers were taken and paperwork that was in Noble's wallet. Noble also made statements to law-enforcement agents and consented to a search of his motel room.

II. Discussion

Noble seeks to suppress all evidence obtained from him as a result of the March 9, 1999 stop of the IROC, including information seized from his pager and wallet and statements to law-enforcement authorities made subsequent to his arrest.[6] Government counsel conceded at the evidentiary hearing that Noble had standing to challenge both the stop of the IROC and his own arrest and that if his arrest were found to have been without probable cause, its fruits would be suppressable. However, government counsel contended that Noble lacked standing to challenge the seizure of items from the person of Christopher or from a search of Christopher's car.[7] Turning to the merits, government counsel asserted that law-enforcement agents effectuated a valid so-called *Terry* stop of the IROC and possessed ample probable cause to have placed Noble under arrest. Defense counsel conceded that if the court were to find both the *Terry* stop and Noble's arrest valid, none of the evidence sought to be suppressed would be suppressable. She argued, however, that neither the *Terry* stop nor the arrest were accomplished in accordance with the dictates of the Fourth Amendment. I have no difficulty concluding that both the stop and the arrest were valid.

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[6]The government acknowledged at the evidentiary hearing that it does not intend to introduce any items found in Noble's motel room into evidence.

[7]The term "standing" in this context is shorthand for a showing that unlawful conduct intruded upon a defendant's legitimate expectation of privacy. *See, e.g., United States v. Bouffard*, 917 F.2d 673, 675 (1st Cir. 1990).

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court recognized that police in some circumstances may "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *United States v. Taylor*, 162 F.3d 12, 17 (1st Cir. 1998) (quoting *Terry*, 392 U.S. at 21) (internal quotation marks omitted). A *Terry* stop must be justified at its inception; that is, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 18 (citations and internal quotation marks omitted).

Information from an informant can suffice to support a *Terry* stop — particularly if, as here, it emanates from a known reliable source, is detailed and is at least partially verified prior to the stop. *See, e.g., id.* at 19. The reasonableness of an officer's reliance upon an informant is not judged by a rigid test; it depends on the totality of the circumstances. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 232-33 (1983).

In this case, Patrick was known to be a reliable confidential informant.[8] He provided substantial detail, much of it predicting future activity of which only a person with first-hand knowledge likely would be aware. Prior to making the stop — and in the space of only a day — officers collectively had verified significant aspects of Patrick's report, including the registration of the IROC to his brother, the suspension of his brother's driver's license, the identity of his brother's alleged client as a known heroin user and the following of a travel route consistent with that described by Patrick, to the extent agents were able to maintain surveillance on the car.

[8]Defense counsel elicited and emphasized the fact that no officer working on this case had first-hand knowledge that Patrick was a reliable informant. The First Circuit has made clear that officers are not required to undertake an independent assessment of an informant's reliability before acting on information provided by another officer cooperating in an investigation. *Taylor*, 162 F.3d at 18 n.2.

Although agents were unable to verify that the car had in fact travelled to Lawrence or that any behavior suspicious of drug dealing had taken place, Lawrence was a known conduit for the supply of heroin to Maine. An officer may take such a factor into consideration. *See, e.g., United States v. Trullo*, 809 F.2d 108, 111 (1st Cir. 1987) (officers making *Terry* stop properly considered fact that conduct suggestive of drug transaction transpired in Boston's "Combat Zone"). The IROC was spotted headed northbound just north of Lawrence within little more than an hour of the time it had been spied heading southbound in York, Maine. Thus, a reasonable inference could be drawn that the purpose of the trip was in fact to purchase heroin in Lawrence, as reported by Patrick. *See, e.g., Alabama v. White*, 496 U.S. 325, 332 (1990) ("Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities."); *Taylor*, 162 F.3d at 20 (noting that Supreme Court had credited proposition that "because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." (citations and internal quotation marks omitted)).

At hearing defense counsel strenuously argued that officers did not do enough to corroborate Patrick's report in view of their knowledge that he was motivated by hostility toward his brother. She posited, for example, that officers could have (i) contacted "Patricia," (ii) double-checked with other unspecified officers or confidential informants, (iii) ensured that surveillance cars were parked at Ozzy's Pizza in Lawrence or (iv) followed the IROC to Portland instead of stopping it in York. Contacting "Patricia," who could have tipped off Christopher that the police were on his trail, would have bordered on the reckless. The suggestion that other officers or confidential informants could

have provided further information is speculative. Finally, officers simply are not required to establish iron-clad surveillance of each step in a purported drug deal to justify a *Terry* stop. *See, e.g., White*, 496 U.S. at 328 (even unverified tip from known informant can suffice to justify forcible stop)*; United States v. Scalia*, 993 F.2d 984, 988 (1st Cir. 1993) ("Corroboration [of a tip] may take various forms . . . and we have never intimated that surveillance is mandatory."). Although it is theoretically possible that an informant with a vendetta could be motivated to trump up charges against the object of his or her ire, there was no reason to believe that was the case here. Patrick was known to be reliable, and significant portions of his report were verified prior to the *Terry* stop. No more was required.[9]

At the point of Noble's arrest, one highly significant new factor had been interjected into the mix: the retrieval from Christopher's shirt pocket of several clear bags containing what appeared to be (and what Christopher did not deny was) heroin. Although — as defense counsel pointed out at the evidentiary hearing — no heroin was found either on Noble's person or elsewhere in the IROC, this did not under the circumstances negate a finding of probable cause to arrest Noble. Noble was himself a target of suspicion from the beginning. Patrick had described Noble as Christopher's usual driver, who knew the purpose of the trips to Lawrence and was in fact paid in heroin. At the point of arrest, Patrick's information had been corroborated in nearly every significant detail, including

[9]To the extent that defense counsel implied that the officers in this case exceeded the bounds of a *Terry* stop, effectuating a *de facto* arrest upon stopping the IROC, I disagree. Despite the presence of at least six law-enforcement vehicles, no weapons were brandished, threats voiced or handcuffs used in the few moments prior to the decision to make official arrests of Christopher and Noble. *See, e.g., United States v. Zapata*, 18 F.3d 971, 975-77 (1st Cir. 1994) (presence of five law officers, one of whom briefly touched defendant, did not transform *Terry* stop into *de facto* arrest when encounter occurred in public place, most of officers were in plain clothes and officers did not voice threats or brandish weapons). Deetjen's subjective belief that Noble was not free to go is of no moment.

the fact that Noble would be driving Christopher's car. Law-enforcement officers hence reasonably could infer that Patrick's remaining unverified information as to Noble likewise would be correct. *See, e.g., Gates,* 462 U.S. at 245-46 (anonymous informant's accurate, detailed description of suspects' travel plans allowed magistrate properly to conclude, in finding probable cause to issue warrant, that informant had access to reliable information concerning alleged illegal activities).

In all, the officers and agents on the scene collectively possessed significant "evidence which would warrant a man of reasonable caution in the belief that a felony ha[d] been committed," *United States v. Diallo,* 29 F.3d 23, 25 (1st Cir. 1994) (citation and internal quotation marks omitted) — the felony in this case being Noble's knowing participation in Christopher's heroin-trafficking enterprise. This simply was not a situation in which Noble occupied the role of a previously unnoticed bystander swept into an arrest by mere proximity to the legitimate subject of a search. *Compare, e.g., Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").

Noble's only remaining argument for avoiding introduction of the evidence he seeks to suppress is that he has standing to challenge the seizure of the heroin from Christopher and that, in the absence of that evidence, the officers lacked probable cause to effectuate his arrest. This argument also is unavailing.[10] The heroin at issue was seized from Christopher's person (his shirt pocket, to be precise). In his post-hearing brief the defendant concedes that he lacks standing to challenge the seizure of evidence from a co-defendant's clothing or person. Supplemental

[10]The proponent of a motion to suppress bears the burden of proving that his own Fourth Amendment rights were violated by the challenged search or seizure. *See, e.g., Bouffard*, 917 F.2d at 675-76.

Memorandum at 2; *see also United States v. Sowers*, 136 F.3d 24, 28-29 (1st Cir. 1998) (defendant who was not himself subject to pat-down search, which is properly viewed as search of person and not of clothing, cannot bottom Fourth Amendment challenge on that search); *United States v. Brown*, 743 F.2d 1505, 1507 (11th Cir. 1984) ("Unlike a house, a hotel room, an automobile or a briefcase, one cannot acquire a right to exclude others from access to a third person."). He clarifies that he predicates his argument for exclusion of the heroin evidence on the alleged unconstitutionality of the *Terry* stop — which, if proven, would warrant suppression under the "fruit of the poisonous tree" doctrine of all evidence seized as a result of that stop, including that taken from a co-defendant's person. Supplemental Memorandum at 3-4. I have already determined the *Terry* stop to have been validly effectuated.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress evidence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 15th day of November, 1999.

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David M. Cohen
United States Magistrate Judge