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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 02-20135-GV**
	)	
RONALD TERRY,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS

Ronald Terry 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 loaded Rossi .357 caliber handgun on April 12, 2002, after having been previously convicted of a felony. Terry seeks to suppress the gun which was retrieved by police officers from a car he was driving, as well as statements he made shortly after his arrest. As a basis for his motion to suppress, Terry argues that the gun was seized pursuant to an unlawful traffic stop in violation of the Fourth Amendment and the statements he made to police were obtained in violation of his Fifth Amendment rights. United States District Court Judge Julia S. Gibbons referred Terry'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 July 22, 2002 and resumed on July 23, 2002. On the first day, the government called its first witness, Lieutenant Benjamin, of the Memphis Police Department's Auto Cargo Task Force (ACTF), and on the second day the government called Officer Anita Bennett, an officer with the Memphis Police Department. The defendant called no witnesses. For the reasons that follow, Terry's motion to suppress should be denied.

PROPOSED FINDINGS OF FACT

As part of the Auto Cargo Task Force for the MPD, Lt. Benjamin ran an undercover used car lot to catch car thieves. Hence, he was aware of a rash of counterfeit or altered drive-out tags generated in Memphis. Often the tags would be a lighter green, or would be black and white, or altered in some way. To assist with some of his cases regarding stolen cars, false drive-out tags and other crimes, Lt. Benjamin used a confidential informant.

On or about April 12, 2002, sometime between 9 a.m. and noon, Lt. Benjamin received a call from a confidential informant regarding a suspected car thief and felon in possession of a firearm. Lt. Benjamin had used the confidential informant about 20 to 50 times in the past five years. In that time, the CI's information had led to 20 to 30 federal or state charges, and approximately 20 to 30 convictions. The CI's information had also

led to 10 to 15 vehicle seizures, and 4 to 5 weapon seizures.[1] On this particular occasion, the CI told Lt. Benjamin that an individual with the street name "Pookie" and given name Ronald Terry, who had a prior felony conviction, would be driving a gray 1992 Chrysler LeBaron, possibly stolen, and possibly with false drive-out tags, and would be dropping off another individual at the intersection of Teal and Castleman. The CI further stated that Terry was armed with a .357 caliber handgun which was wedged between the drivers' seat and center console of the LeBaron. The FBI paid the CI $1,000 for the information.[2]

The ACTF set up surveillance at the intersection of Teal and Castleman to watch for Terry. The radio dispatcher then contacted Officer Anita Bennett in her patrol car and told her that the ACTF would need her assistance in apprehending a suspect. Officer Parrish, another officer on the ACTF, met with Officer Bennett at the intersection of Perkins and Knight Arnold the day of the arrest to convey to her the CI's information about Ronald Terry. Officer Parrish told Bennett Terry's name, showed her a picture of Terry, gave her a description of the LeBaron, and told her he was possibly

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[1] Lt. Benjamin could not recall how many search warrants, if any, had been obtained in conjunction with the CI's information.

[2] The CI is apparently now in custody on an unrelated felony charge.

armed and was a suspect in a homicide. He told her, however, to try and pull him over for another reason so as not to make him suspicious. He gave her a 2-way radio to stay in communication with the ACTF officers.

Meanwhile, the surveillance team observed Terry drop off an individual at the intersection of Teal and Castleman. They then radioed for Bennett's assistance, telling her Terry was now on Mendenhall, and she drove to the location on Mendenhall described by the officers. Officer Bennett caught sight of the car matching the one described by the ACTF, pulling out of a parking lot and then heading southbound on Mendenhall.[3]

Officer Bennett followed the LaBaron for a while and noted that the drive-out tag on the vehicle seemed "altered"[4] as the numbers on the tag did not completely fill up the spaces provided. The police department had circulated a memorandum regarding counterfeit drive-out tags several months before, and Officer Bennett found the tag to be suspicious. She then pulled the LeBaron over and her partner, Officer Blakely, in a separate patrol

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[3] The surveillance team followed Terry to a day care center on Mendenhall. He got out of the car and went inside for less than fifteen minutes, then returned to his car. It seems that this is the parking lot from which Terry was exiting when Officer Benett first spotted him.

[4] Officer Benett explained that, to her, "altered" meant "not valid" or "incorrect."

car, pulled over as well. They approached the vehicle together. Officer Bennett noted that Terry matched the physical description that Officer Parrish had given her and he appeared to be acting nervous. She asked to see his license, which he gave to her. Terry then asked Officer Bennett why she had pulled him over. She stated that she stopped him because of his tag. Terry then told her that the car did not belong to him, but rather someone named John. She then looked closer at the drive-out tag and noted that the issuance date was marked over with marker rather than hole-punched out and that only the last four digits of the vehicle identification number were written on the tag.

Officer Bennett walked back to the patrol car while her partner, Officer Blakely, remained at the car. She saw that the name on the driver's license was Ronald Terry and radioed this in to the ACTF officers, who instructed her to check him for weapons. She then returned to the car and asked Terry to step out of the car. As he leaned against the car and she began to pat him down, he broke away and ran about 50 to 75 yards. Officer Bennett gave chase, but Officer Barron of the ACTF, who had just arrived on the scene, caught up with Terry, arrested him and put him in the squad car. Officer Bennett walked back up to Terry's car and, looking in from the outside, saw the handle of a gun sticking up between the seat and the console. She then returned to the patrol car to fill

out the necessary paperwork with Officer Blakely at which point Terry asked again why he was stopped. Officer Bennett told him it was because of his tag. Terry then told the officers that the only reason he ran was because of the gun in his car.

A short while later, Lt. Benjamin arrived on the scene. He was called to the scene to determine if the drive-out tag was authentic or counterfeit. He had heard about the arrest over the radio. When he arrived, he walked over to the patrol car to check on Terry. He sat in the front seat and asked Terry through the screen "What's up?" or "How are you?". Terry then told Lt. Benjamin generally that he had messed up and had to get away from the car because he had been charged with a home invasion in Chicago. Lt. Benjamin then walked over to the LeBaron Terry had been driving and, standing outside the car, saw the grips of a .357 caliber pistol sticking out from between the drivers' seat and the center console of the car.

Although Lt. Benjamin contradicted himself on portions of his testimony concerning the basis of the CI's knowledge and his reasons for not obtaining a warrant for the search,[5] Lt. Benjamin was overall a credible witness. The court finds as fact that Lt.

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[5] First, Lt. Benjamin stated that he did not have enough time to obtain a warrant. Later, on cross examination, he stated that he simply did not feel that a warrant was necessary, based on the amount of evidence he had on Terry from the CI.

Benjamin received a call from a CI he had used in the past and that the CI provided the information Lt. Benjamin described in his testimony.

Officer Bennett's testimony was very credible. She did not waiver on her testimony regarding the condition of the drive-out tags and her information from ACTF regarding Terry. She even stated with utmost candor that the reason her affidavit upon arrest did not contain references to the CI, but rather only the suspicious drive-out tags, was because the ACTF officers had told her not to mention the CI information. The court finds as fact that the effectuation of the stop of Ronald Terry and his subsequent arrest occurred in the fashion described by Officer Bennett.

PROPOSED CONCLUSIONS OF LAW

A. The Stop, Frisk and Arrest

Because the initial stop, the search of Terry's person and of the LeBaron, the seizure of evidence, and the arrest of Terry in this case were performed without a warrant, the burden of proving that they were lawful under the Fourth Amendment is on the government. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(b) (3d ed. 1996).

Terry argues that there was no reasonable suspicion or probable cause for the officers to stop the car in which he was

traveling because he had not committed a traffic offense and the officers had not observed him do anything illegal or out of the ordinary. Terry further contends that because there was no reasonable suspicion for the stop, there was likewise no probable cause for searching his person, and, therefore, his subsequent arrest and the search of the LeBaron were unlawful under the fruit of the poisonous tree doctrine. Terry submits that all evidence obtained by the officers as a result of their illegal acts should be suppressed because the stop, frisk, search of the car, and arrest were illegal.

1. Stop, Frisk and Arrest Based on Drive-Out Tag

The government contends that the Fourth Amendment requires only reasonable suspicion to support the initial stop, not probable cause, and that the unusual appearance of the drive-out tag provided reasonable, articulable suspicion for a stop. The government further argues that the police did not illegally seize evidence from the car, but rather that the gun was in plain view. The government concedes that probable cause was required for the search of the LeBaron but maintains that probable cause developed during the initial stop.

In the alternative, the government asserts that the information provided by the CI, corroborated by police observation, was enough to create probable cause to stop the car. In addition,

even if Officer Bennett did not have all of the information that the CI originally offered, the collective knowledge of the police force was sufficient to allow Officer Bennett to stop Terry.

A stop and frisk, an arrest following a stop, and a search of a vehicle thereafter are not to be treated as one collective action, but rather each of the acts must be considered separately. *United States v. Bentley*, 29 F.3d 1073, 1075 (6th Cir. 1994). The court will, therefore, first consider if the initial stop was justified, and if so, whether the subsequent frisk of Terry was justified. If the court finds that the stop and frisk were proper, the court will then consider whether there was probable cause to search the vehicle in which he was traveling and finally whether there was probable cause for his arrest.

a. <u>The Initial Stop</u>

Generally, under the Fourth Amendment, a police seizure of a person must have probable cause. *United States v. Fountain*, 2 F.3d 656, 661 (6th Cir. 1993). An exception to this requirement was set forth in *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), and approved in succeeding cases, for limited investigatory seizures. "[A] policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the circumstances that provoke

suspicion.'" *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)(footnote omitted)(quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). To establish that a seizure not supported by probable cause was "reasonable," the law enforcement officer must have a reasonable, articulable suspicion that crime is afoot. *Terry*, 392 U.S. at 21-22. Thus, the primary issue as to the initial stop is whether it was justified at its inception under the less stringent "reasonable suspicion" standard. *United States v. Bradshaw*, 102 F.3d 204, 211 n.13 (6th Cir. 1996).

In the present case, Terry had not committed any moving traffic violation, nor had the officers observed any suspicious conduct on the part of Terry to justify the stop. Rather, the stop was made due to the suspicious appearance of the drive-out tag on the car Terry was driving. The specific issue, then, is whether the appearance of the tag was sufficiently questionable to afford police officers reasonable suspicion of criminal activity to justify the stop.

Both Officers Bennett and Benjamin testified that they were aware that many counterfeit and altered drive-out tags had been discovered in Memphis. Lt. Benjamin stated that at least a thousand such tags had been recovered in this area. A police-force-wide memorandum was introduced into evidence which explained some of the characteristics of counterfeit drive-out tags. To both

officers, it appeared that the tag had been improperly filled out. There are instructions and illustrations for guidance on the back of the tag to explain the correct method in which the tag must be filled out. While the instructions state only that the numbers must be legible, in black marker and at least two inches high, the illustration shows that each block is filled in completely, which would make the numbers darker and more legible.

As Officer Bennett drove behind the LeBaron, the numbers did not appear to be filled out completely. Based on the information that she had received regarding the problem with counterfeit and altered drive-out tags in the area, it was reasonable for Officer Bennett to suspect that criminal activity might be afoot. While an officer may not just pull over anyone with a drive-out tag based on the rash of counterfeit or altered tags, this particular tag did not seem to be filled out in the way that it should have been which made it suspicious.

In addition, the directions for completing the drive-out tag state that the issuance date must be shown by punching holes out on the correct date. On the tag in question, someone had scratched through the date with a marker. The tag also had an area where the vehicle identification number was to be filled out. The tag on the car Terry was driving had only the last four digits of the VIN written out. These differences, however, were not discovered by

Officer Bennett until after she had made the stop and therefore cannot justify the stop, but they were discovered as she approached the vehicle and certainly added to her suspicions justifying further investigation.

b. <u>The Pat-down Search</u>

Terry further contends that, in conjunction with the unlawful stop, there was no probable cause for the search of his person. It is well settled that in a *Terry* stop and frisk, police are entitled to pat-down the outer layers of a person's clothing for weapons if they have reason to believe they are dealing with "an armed and dangerous individual, regardless of whether [they] ha[ve] probable cause to arrest the individual." *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. at 22-24. However, such a protective pat-down must be strictly limited to that which is necessary for the discovery of weapons that might be used to harm the officer or others nearby. *Terry*, *id.* at 26.

Because the court has concluded that the stop was justified by reasonable suspicion that Terry might be driving a car with counterfeit or altered tags, it is submitted that the frisk of Terry for a weapon was reasonable as well. In this case, Officer Bennett testified that she frisked Terry for weapons but found none.

c. The Arrest

Before Officer Bennett asked Terry to step out of the car, she noted that he acted nervous when she approached the vehicle. After Terry was out of the car and while Officer Bennett was frisking him for weapons, he broke away and fled the scene, whereupon Officer Barron of the ACTF caught him about 50 to 75 yards from the car. Based on this behavior, her reasonable suspicion became probable cause to believe that Terry had committed a crime. Therefore, his arrest, though warrantless, was supported by probable cause.

2. Stop, Frisk, Arrest Based on Confidential Informant's Tip

In the alternative, the government argues that the police had corroborated information from a very reliable informant regarding Terry and the car he was driving, which gave the officers not only reasonable suspicion, but probable cause to stop the car.

Probable cause may be based on information from a reliable, known informant or information from an independent source that can be independently corroborated. *United States v. Wright*, 16 F.3d 1429, 1437-38 (6th Cir. 1994)(finding probable cause to search a rental car based on information from an informant about defendant's method of operation and police's observation of similar behavior by the defendant). The prior criminal record of the informant is a factor to consider in determining probable cause. *See Brinegar*, 338 U.S. at 173. While warrantless searches and seizures are *per*

se unreasonable under the Fourth Amendment, *United States v. Roarke*, 36 F.3d 14, 17 (6th Cir. 1994)(quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)), because of the mobility of an automobile and the reduced expectation of privacy in an automobile, a search of an automobile is an exception to the warrant requirement. *California v. Carney*, 471 U.S. 386, 390-391 (1985).

Under the collective knowledge doctrine, "probable cause can rest on the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest." *United States v. McManus*, 560 F.2d 747, 750 (6th Cir. 1977)(citing *United States v. Nieto,* 510 F.2d 1118, 1120 (5th Cir. 1975)). Where arresting officers relied on a police radio bulletin to arrest two defendants, the Supreme Court stated that it was reasonable for the arresting officers to assume "that whoever authorized the bulletin had probable cause to direct [the defendants'] arrest." *Whiteley v. Warden*, 401 U.S. 560, 568 (1971). To rule otherwise would "unduly hamper law enforcement." *Whiteley*, 401 U.S. at 568. Other circuits share this notion of collective knowledge by the entire police force to effectuate a valid arrest.[6] The Circuit Court of

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[6] *See United States v. Valencia*, 913 F.2d 378, 383 (7th Cir. 1990); *United States v. Ashley*, 569 F.2d 975, 983 (5th Cir. 1978); *White v. United States*, 448 F.2d 250, 254 (8th Cir. 1971); *Wood v. Crause*, 436 F.2d 1077, 1078 (10th Cir. 1971); *United States v. Valez*, 796 F.2d 24, 28 (2d Cir. 1986).

Appeals for the District of Columbia stated:

> **[I]n a large metropolitan police establishment the collective knowledge of the organization as a whole can be imputed to an individual officer when he is requested or authorized by superiors to make an arrest. The whole complex of swift modern communication in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his first hand knowledge of facts concerning a crime or alleged crime.**

***Williams v. United States*, 308 F.2d 326, 327 (D.C. Cir. 1962).**

The CI who gave Lt. Benjamin information on April 12, 2002, the day of Terry's arrest, had a proven track record of reliabity. Lt. Benjamin had used this informant for the last five years and the CI's information had resulted in 20 to 50 arrests and charges, both state and federal. The information provided by the CI - Terry's name, the car he was driving, where he would go, what he was doing there - was completely corroborated by the officers conducting surveillance that day. The officers watched Terry drive a 1992 gray Chrysler LeBaron with drive-out tags to the intersection of Castleman and Teal and drop off someone there. This course of events matched perfectly the information provided by the informant.

Before Officer Bennett pulled Terry over, she knew: 1) the physical appearance of Terry; 2) Terry's name; 3) the description of the car he was driving; 4) that he was possibly armed; and 5) he

was a homicide suspect. Alhough Officer Bennett did not have the complete details regarding Terry's criminal past or the type of gun he was carrying or how the officers had obtained the information, she was acting as a unit with the ACTF who did have all the information and who directed her to stop Terry. The knowledge of the ACTF coupled with Officer Bennett's own observations and those of the surveillance officers corroborated the informant's tip down to the last detail. The stop, frisk and arrest, though warrantless, were conducted based on solid evidence demonstrating probable cause to believe Terry had committed a crime. Based on these facts, Officer Bennett had grounds to stop Terry and frisk him for weapons. When he then attempted to flee, Officer Bennett was justified under the law to arrest him. The court submits that the arrest was lawful and therefore did not violate Terry's Fourth Amendment rights.

B. Seizure of the Gun

The next issue is whether the seizure of the gun violated Terry's constitutional rights. Terry was already in custody when the gun was retrieved. Indeed, Lt. Benjamin stated that when he arrived on the scene, Terry was in the back of the patrol car and the gun was still in the LeBaron. The late retrieval of the gun, in this circuit, however, is still a search incident to arrest. *United States v. White*, 871 F.2d 41, 44 (6th Cir. 1989)(finding

permissible a search of a vehicle after defendant had been arrested and put in patrol car and officers saw a weapon through the drivers' side window).

A search incident to arrest is a valid exception to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). The Supreme Court has stated that the right to search an automobile incident to arrest exists, even when the defendant can no longer access the item during the search. As long as the item was within the defendant's "immediate control" prior to or concurrent with his arrest, the search is valid. *New York v. Belton*, 453 U.S. 454, 461-62 n.5 (1981). Even when a defendant has been arrested and is in a patrol car, a search of his vehicle remains a valid search incident to arrest. *White*, 871 F.2d at 44.

Although it is not clear to this court how much time transpired between Terry's arrest and the seizure of the gun, based on the above caselaw, the search of the vehicle was valid. The gun, situated next to the drivers' seat, was clearly within Terry's "immediate control" prior to the arrest. Though he could no longer access the weapon after he was arrested, the Supreme Court and the Sixth Circuit both find that a search of a vehicle after an arrest is a permissible exception to the warrant requirement.

Moreover, both Officer Bennett and Lt. Benjamin stated that the handle of the gun was clearly visible from outside the car.

The gun was wedged between the seat and center console of the LeBaron, with the handle, or grips, of the gun protruding. The government argues therefore that the plain view exception applies as well to this search.

To invoke the plain view exception to the exclusionary rule 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 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.

The ACTF had information from the CI that Terry had a .357 caliber weapon in the car and that it would be positioned between the center console of the car and the drivers' seat. After Terry was arrested, Officer Bennett stated that she walked back over to the LeBaron and, peering into the interior of the car while standing outside on the street, she could plainly see the handle of a gun exactly where the informant said it would be. Later, when Lt. Benjamin arrived on the scene, he looked into the car, and without entering it, also could see the end of the gun next to the

drivers' seat. The gun therefore meets the first part of the plain view analysis, i.e., the gun was plainly visible from a vantage point outside the car, where officers had a right to be. Second, the criminal nature of the weapon was immediately apparent as the officers had reliable information from the CI that Terry was a convicted felon. Both Officers Benjamin and Bennett have over 18 years with the Memphis Police Department. Both know that it is illegal for a convicted felon to possess a weapon. This court submits therefore that the weapon was in plain view, incriminating in nature, and found subsequent to a valid stop and arrest.

C. Statements Made by Terry

Terry made two statements to police on the day that he was arrested. First, he made a statement to Officer Bennett immediately after his arrest in the patrol car. Then, Terry made a statement to Lt. Benjamin, also subsequent to his arrest and while he was seated in the patrol car. Terry argues that both of these statements were elicited in violation of his *Miranda* rights.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Supreme Court in *Miranda* applied the Fifth Amendment privilege to custodial interrogations by police and prohibited the introduction of statements obtained in custodial interrogations unless the defendant was advised of his constitutional rights and

subsequently waived them. *Miranda v. Arizona,* 384 U.S. 436 (1966).

***Miranda* warnings are only required if defendant is in custody and subject to interrogation. In making a determination of custody for *Miranda* purposes, "'the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). "'The term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the subject.'" *United States v. Knox*, 839 F.2d 285, 295 (6th Cir. 1988)(quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).**

1. <u>Terry's Statement to Officer Bennett</u>

Terry's first incriminating statement took place while Officer Bennett was filling out the requisite paperwork after an arrest. She was seated with her partner, Officer Blakely, in the patrol car. Terry was in the back of the patrol car. According to Officer Benjamin, Terry initiated the conversation by asking her why she had pulled him over. She stated that she had pulled him over based on the condition of his drive-out tag. Terry then stated that the only reason he ran was because of the gun in the

car.

Plainly, Terry was in custody, but Officer Bennett did not initiate a conversation with him. Any custodial interrogation or any statement designed to elicit an incriminating response would violate Terry's *Miranda* rights; the conversation, however, was initiated entirely by Terry. Officer Bennett asked him no questions and made no statements that would be expected to coerce Terry to answer in violation of his rights. This court submits that the statement made to Officer Bennett should not be suppressed because it was completely voluntary in nature.

2. <u>Terry's Statement to Lt. Benjamin</u>

After his conversation with Officer Bennett, Terry made an incriminating statement to Lt. Benjamin, who arrived on the scene shortly after Terry's arrest. Upon hearing that the officers on the scene had to chase Terry to arrest him, Lt. Benjamin walked over to the patrol car where Terry was seated, got into the front of the car and asked Terry, "What's up?" or "How are you?". Terry argues that this statement was coercive and designed to elicit an incriminating response about what had transpired prior to the arrest. The government contends that Lt. Benjamin was merely concerned about the well-being of Terry - not because he was genuinely concerned, but for liability purposes. It is logical that officers would want to confirm that a fleeing arrestee was not

injured through excessive force of the officers who caught him.

Upon hearing Lt. Benjamin's inquiry, Terry responded immediately, saying, "I f—ed up" and that he had to get away from the car and the gun because of a home invasion charge against him in Chicago. Terry volunteered this statement without pause. Lt. Benjamin's question of either "What's up?" or "How are you?" was sufficiently vague that a reasonable person would not think that the question was designed to elicit an incriminating response. Terry was not coerced into making the statement. Further, there are many other responses, such as "not so good" or "fine" that he could have made to answer the question; or he could have simply remained silent. The court submits that Terry's statement to Lt. Benjamin should not be suppressed because it was voluntary and elicited in a noncoercive manner.

RECOMMENDATION

It is therefore recommended for the reasons set forth above that Terry's motion to suppress the gun seized and statements made to police subsequent to his arrest be denied.

Respectfully Submitted July 30, 2002,

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE