

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

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

No. 02-20188-G

MICHAEL LEE BAILEY and)
ANTONIO FITZGERALD JOHNSON,)

Defendants.)

REPORT AND RECOMMENDATION ON
DEFENDANT ANTONIO JOHNSON'S MOTION TO SUPPRESS

Antonio Johnson was indicted in connection with an armed robbery that occurred on or about August 3, 2000 at the Brighton Bank, 1940 Madison Avenue, Memphis, Tennessee. Johnson is charged with one count of bank robbery, in violation of 18 U.S.C. § 2113 (a)-(b), and one count of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. §924(c). Johnson seeks to suppress items retrieved by police officers from a car he was driving, as well as statements made during a custodial interrogation at Memphis's 201 Popular Avenue police station. As a basis for his motion to suppress, Johnson argues that the evidence was seized pursuant to an unlawful traffic stop and search in violation of the Fourth Amendment. He also argues that statements to the police were the result of an unlawful custodial

interrogation. Johnson's motion to suppress was referred to the United States Magistrate Judge for an evidentiary hearing and report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

At an evidentiary hearing on November 4, 2002, the government called one witness, Detective Joseph Everson, of the Shelby County Sheriff's Department and Federal Bureau of Investigation's Safe Streets Task Force. The defense presented no testimony. For the reasons that follow, this court recommends that Johnson's motion be denied.

PROPOSED FINDINGS OF FACT

Detective Joseph Everson investigated three Memphis area bank robberies between February 2000 and July 2001. All three robberies shared a common theme: witnesses consistently described the perpetrators as (1) a black male dressed as a woman wearing a bob-cut wig, and (2) a black male more heavily-built and approximately six feet tall. The first robbery occurred on February 9, 2000, at the Union Planters' Bank; the second occurred on August 3 or 9, 2000, at Brighton Bank; and the third occurred on June 5, 2001, at the First South Credit Union. In the course of the investigation, as outlined below, defendants Michael Bailey and Antonio Johnson emerged as primary suspects.

In February 2000, Detective Everson obtained security

photographs from the Union Planters robbery which showed the two suspects from that robbery: one dressed as a woman with bob-cut black hair and the other as a larger black male. (Ex. 1.) Detective Everson later obtained security photographs from the Brighton Bank robbery which showed the two suspects entering a vehicle. One was dressed as a woman with bob-cut black hair. (Ex. 2.) Detective Everson showed these photographs to witnesses to the First South robbery. There were no security photographs from the First South robbery. The witnesses said that the First South robbery suspects matched the appearance of the suspects from the other two robberies.¹ Detective Everson then arranged to have the robberies and photographs featured on the local television's June 20, 2001 segment of "Mid-South's Most Wanted."

Shortly after the "Most Wanted" program aired, an anonymous tipster called Memphis Crime Stoppers. The tipster identified the perpetrator in female clothing as Michael Bailey and identified the second perpetrator only as "T." (Ex. 9.) The tipster agreed to meet in person with Detective Everson and Special Agent Carter. At that meeting, the tipster, who remains anonymous, told officers that Bailey had nerve damage in his left hand which prevented him from bending his fingers on his left hand. When the officers later

¹ In this robbery, a third suspect was also reported: a male, "shorter and fatter" than the other two.

viewed bank security videos, they saw that one of the perpetrators had limited movement of the fingers on his left hand. The tipster also told the officers that Baily and "T" were gambling buddies. The tipster said that "T" drove a red Beretta and gave the Beretta's tag number to the officers.

Detective Everson searched traffic and parking violations for the Beretta tag number. The Beretta was not registered to Johnson but Everson found that a traffic ticket had been issued to Johnson while he was driving the Beretta. Officers returned to the tipster and presented a photograph of Johnson, as well as security photographs from the bank robberies. The tipster identified Johnson as Bailey's friend "T" and identified the two photographed suspects as Bailey and Johnson.

Around the same time, a security guard from the Hampton Inn called law enforcement officers to report suspicious activity associated with a "dark-colored Lumina-type" vehicle. The guard reported that the Lumina had a drive-out tag² in the right-hand back windshield. He had observed a person in the Lumina dump a bag in the Hampton Inn dumpster. Officers retrieved the bag and discovered a bob-cut wig, gloves, and medical scrubs. Officers also obtained a video still of the vehicle. (Ex. 3.)

² A "drive-out tag," Detective Everson testified, is a temporary tag issued by an automobile dealer.

On June 26 or 27, 2001, Detective Everson began an investigation and surveillance on Johnson and Bailey. The investigation revealed that both Johnson and Bailey's drivers' licenses had been revoked. Officers photographed the red Beretta at Johnson's workplace. Officers also photographed Bailey entering, exiting, and driving a blue Lumina with a drive-out tag in its back windshield. (Ex. 5.) Officers showed photographs of the blue Lumina to the Hampton Inn security guard who confirmed that it appeared to be the same vehicle he had seen. Officers showed a photograph of Johnson, displayed in a six-man photographic array, to Brighton Bank teller Emily Jerles. (Ex. 4.) Jerles was "70% sure" that Johnson was the man who robbed her at Brighton Bank. *Id.*

On June 28, 2001, Lieutenants Good and Golden saw Bailey and Johnson driving together in the red Beretta. They notified Detective Everson by radio. Detective Everson advised them that neither Johnson nor Bailey had a valid driver's license and to pull over the Beretta. The officers did so. Lieutenant Golden searched the Beretta and found a .357 Ruger revolver in the passenger cab; marijuana in the passenger cab; and gloves, a ski mask, and several pairs of sunglasses in the Beretta's trunk. Defendant Johnson was arrested for driving without a license; narcotics possession; and suspected robbery. Lieutenant Terry Cochran advised Johnson of his

Miranda rights on the scene and asked several short questions about the evidence revealed in the search. Johnson admitted ownership of the gun. Bailey was also arrested, and the Beretta was towed to the police impound area.

Officers transported Johnson to the police station at 201 Poplar Avenue, where he was held for questioning. Before questioning, Detective Everson completed an Advice of Rights form, and Johnson signed it. (Ex. 6.) At no time, during arrest or during questioning, did Johnson request an attorney. The questioning lasted about fifteen minutes. Johnson admitted his relationship with Bailey but repeatedly denied any involvement in the Brighton Bank or other bank robberies. (Ex. 7.)

After reviewing all the testimony and exhibits, pleadings, charging documents, and argument of counsel, this court submits that Detective Everson's testimony is credible in its entirety and should be accepted as fact.

PROPOSED CONCLUSIONS OF LAW

Johnson now challenges the circumstances surrounding his arrest and subsequent questioning. He seeks to suppress evidence found in the Beretta and all statements given to officers. His motion raises two issues: (1) whether officers had probable cause to stop and search the Beretta, and (2) whether the statements he made at 201 Poplar Avenue were the result of an unlawful custodial

interrogation.

A. Lawfulness of the Automobile Stop and Search

Because the initial stop, the search of the Beretta, and the seizure of evidence were all performed without a warrant, the government bears the burden of proving that they were lawful under the Fourth Amendment. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(b) (3d ed. 1996). Each of the government's acts must be considered separately. *United States v. Bentley*, 29 F.3d 1073, 1075 (6th Cir. 1994). Generally, "[s]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of" the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The Fourth Amendment also prohibits warrantless searches, unless an exception to the warrant requirement applies. U.S. CONST. amend. IV; *United States v. Roarke*, 36 F.3d 14, 17 (6th Cir. 1994) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

The government argues that the stop and search were valid under three separate grounds: the automobile exception to the warrant requirement, probable cause to believe a traffic violation had occurred, and an inventory search. This court concludes that all three are valid grounds for the stop and search under these circumstances.

The Fourth Amendment exempts police from obtaining a warrant

to search an automobile when they have probable cause to believe the automobile contains contraband or evidence of criminal activity. *United States v. Ross*, 456 U.S. 798, 805 (1982) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1923)). Similarly, a warrantless seizure of a person must be grounded in probable cause. See *United States v. Fountain*, 2 F.3d 656, 661 (1993). "Probable cause is defined as 'reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.'" *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993), cert. denied 513 U.S. 828 (1994) (quoting *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990)).

Here, Detective Everson and other officers had conducted an extensive investigation of Johnson's possible connection with the Brighton Bank robbery. From interviewing the Crime Stoppers tipster, officers learned the identity of Bailey, that the other robber was known as "T" and drove a red Beretta, and that Johnson and Bailey were friends. From the officers' own investigations and surveillance, they learned that Johnson had been driving the red Beretta and that Bailey drove a blue Lumina. From the security guard's report at the Hampton Inn, people driving a dark Lumina-type vehicle were seen dumping a bob-cut wig that numerous robbery witnesses had described. A Brighton Bank teller identified Johnson in a photographic array and said she was "70% sure" that he was one

of the Brighton Bank robbers. The tipster identified Johnson as "T." Detective Everson's own observation was that Johnson's picture matched the surveillance photograph of one of the Brighton Bank and Union Planters robbers. In addition, an officer may rely on a task force's cumulative knowledge and on a superior officer's knowledge in making his own probable cause determination. See *United States v. Woods*, 544 F.2d 242, 259-60 (6th Cir. 1975), cert. denied 430 U.S. 969 (1977), reh'g denied 431 U.S. 960 (1977).

At the evidentiary hearing, the defense pointed out that none of the items retrieved from Johnson's Beretta were clearly connected with the Brighton Bank robbery. The defense also suggested that the Crime Stoppers tipster was not a credible source because of prior criminal history. Nevertheless, this court submits that the arresting officers had probable cause to believe that Johnson and Bailey had committed the crime of bank robbery and to arrest them and that the arresting officers had probable cause to believe evidence of the crime could be found in the Beretta that Johnson was driving and in which Bailey was a passenger. In addition, the search of the vehicle was lawful as a search incident to the arrest. Accordingly, this court submits that both the seizure and the search are lawful under the Fourth Amendment.

A traffic stop is reasonable under the Fourth Amendment if officers have probable cause to believe a traffic violation

occurred, "and it is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop." *Ferguson*, 8 F.3d at 391. Here, too, officers may rely on a superior officer's knowledge when making their determination of probable cause. See *Woods*, 544 F.2d at 259-60. Because Detective Everson informed the officers, via radio, that neither person in the Beretta had a valid driver's license, this court submits that the officers had probable cause to stop the Beretta for a traffic violation.

An inventory search exception to the warrant requirement arises when law enforcement officers search a legitimately seized vehicle, including its trunk, in accordance with official procedure. *United States v. Hurst*, 228 F.3d 751, 758 (6th Cir. 2000); *United States v. Lumpkin*, 159 F.3d 983, 986-87 (6th Cir. 1998). Here, the officers had been advised that neither of the Beretta's occupants had a valid driver's license. The officers searching the Beretta had no reason to believe any third party would appear who could legally drive the automobile. The officers therefore had grounds to impound the car and inventory the contents of the car before impounding it. In fact, the Beretta was subsequently towed to a police impound area. Accordingly, this court submits that the search of the Beretta falls into the inventory search warrant exception for a legally seized vehicle.

B. Lawfulness of Custodial Interrogation

The Constitution's Fifth Amendment privilege against self-incrimination prohibits the introduction of statements made during custodial interrogations unless the defendant was advised of his constitutional rights and subsequently waived them. *Miranda v. Arizona*, 384 U.S. 436 (1966). The parties do not dispute that Johnson was in custody at 201 Poplar Avenue: he had been formally arrested and he was restrained in a room in the police station. See *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (noting that "[t]he ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.") (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Nor do the parties dispute that Johnson was interrogated when he was expressly questioned. See, e.g., *United States v. Knox*, 839 F.2d 285, 295 (6th Cir. 1988) (noting that express questioning is questioning for purposes of *Miranda*) (citing and quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). The inquiry is whether Johnson was advised of his rights. The court has found as fact that Lieutenant Cochran administered *Miranda* warnings at the time of arrest. Detective Everson also presented Johnson with an Advice of Rights form, which Johnson apparently signed without protest. Johnson did not request an attorney at any time. Based on the foregoing facts, the court submits that Johnson

was advised of his legal rights, that the interrogation was lawful, and that Johnson's statements should not be suppressed.

CONCLUSION

For the foregoing reasons, it is submitted that Detective Everson's testimony should be accepted in its entirety as fact and that the stop and search of the vehicle and Johnson's custodial interrogation were lawful under the Constitution's Fourth and Fifth Amendments. Accordingly, it is recommended that Johnson's motion to suppress be denied.

Respectfully submitted this 6th day of November, 2002.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE