UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 03-26-P-H***
	)	
EDWARD J. FOX,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

Edward J. Fox, charged in a single-count indictment with knowing possession of an unregistered firearm (an altered full-metal-jacket Cobray, model SH, .410 single-barrel shotgun) in violation of 26 U.S.C. §§ 5861(d), 5841, 5845(a) and (d) and 5871, seeks to suppress evidence seized and statements made during a roadside traffic stop in Limington, Maine on December 21, 2002 and during a jailhouse interview the following day. Indictment (Docket No. 3); Motion To Suppress, etc. ("First Motion") (Docket No. 14); Motion To Suppress, etc. ("Second Motion" (Docket No. 15); Motion To Suppress, etc. ("Third Motion") (Docket No. 16); Motion To Suppress, etc. ("Fourth Motion") (Docket No. 17); Motion To Suppress, etc. ("Fifth Motion") (Docket No. 18).

An evidentiary hearing was held before me on July 30, 2003 at which the defendant appeared with counsel and at the conclusion of which counsel for both the defendant and the government argued orally. I now recommend that the following findings of fact be adopted and that the motions be denied.

I. Proposed Findings of Fact

At about 9:55 p.m. on December 21, 2002 Maine State Police ("MSP") trooper Eric E. Bergquist was on rural patrol duty, traveling east in his cruiser on Route 25 in Limington, Maine, when

he saw two oncoming vehicles (a pickup truck followed by a sedan) heading west on Route 25. Bergquist, who was alone in his cruiser with his dog in the back seat, looked in his rearview mirror as the vehicles passed him. He could not see either a rear license plate or a plate light on the sedan. He was aware that Maine motor-vehicle law requires that a vehicle have a license-plate light capable of illuminating the plate from a distance of approximately fifty feet.

Bergquist turned his cruiser around and caught up with the two vehicles at a red light at the intersection of routes 25 and 11. With the aid of the artificial lighting at the intersection, he was able to discern that the sedan did have a rear license plate. However, he could not tell whether its plate light was functioning. He followed the vehicles as both turned north onto Route 11. After a short distance, as the artificial light receded, he turned his headlights down to parking-light brightness and pulled approximately twenty-five feet behind the sedan. He again could not make out either the plate light or the plate. He turned on his headlights and activated his blue lights and spotlight. The sedan immediately pulled over. As it came to a stop, Bergquist observed its sole occupant making a ducking motion as though either reaching for something under a seat or placing something under it. In Bergquist's experience, the majority of drivers keep their insurance and registration papers in their visors or glove compartments; however, some people do keep their wallets under their seats.

Bergquist, who was in uniform, got out of his cruiser and approached the driver's side of the sedan with a flashlight. Thinking the sedan and pickup truck were traveling together, he asked the driver who had been in front of him. The driver said he did not know. Per standard procedure on traffic stops, he then asked the driver for his license, registration and proof of insurance. The driver had these documents ready and immediately produced them. Among them was a Maine driver's license with a photograph identifying the person depicted as Edward Fox. This jogged Bergquist's memory, and he recognized the driver as the same Edward Fox he had arrested following a traffic stop

for a headlight violation in 1999. That stop had led to Fox's arrest on charges of carrying brass knuckles and concealing a loaded .32-caliber Derringer between the seats, as well as on marijuana and prescription-drug-violation charges.[1] Bergquist noticed what seemed to be a fairly large bulge in Fox's left inside jacket pocket. He decided, for safety reasons, to order Fox out of the sedan.

Bergquist directed Fox to exit his sedan, walk to the cruiser, stand with his feet apart and place both hands on the cruiser hood. Fox complied. At this point, both Bergquist and Fox understood that Fox was not free to leave the scene. As Bergquist accompanied Fox to the cruiser, he asked him about his criminal history. Fox responded that he had been arrested for drug violations but that he had been to a methadone clinic and had been clean for about a year. Bergquist asked him what drugs he had used; Fox replied that he had used methadone, heroin and marijuana, among others. Bergquist also asked Fox if he had any weapons, drugs or anything else about which Bergquist should be concerned. Fox replied that he had "a set of rings," which Bergquist understood to mean brass knuckles. Bergquist commenced patting Fox down. The bulging pocket that had concerned Bergquist turned out to contain Fox's wallet and a large stack of paperwork. Bergquist then found a set of brass knuckles in Fox's left front pants pocket. He immediately placed Fox under arrest for carrying a concealed weapon and handcuffed him.

Bergquist then proceeded to search the person of the now-handcuffed Fox more thoroughly. In Fox's shirt pocket he found a spoon with white residue and burn marks that he suspected had been used to cook narcotics, as well as a straw with a white-powder residue and a trifold containing a white powder. Bergquist asked Fox what the white powder was; Fox replied that it was baking soda.

[1] Bergquist testified that he believed Fox had pled guilty to the concealed-weapons charge but that he did not know the disposition of the remaining 1999 charges. He also testified that on the night of December 21, 2002 his concern was that he was confronting an individual who had a history of carrying loaded firearms in his vehicle, and that he was not concerned about the disposition of the (*continued on next page*)

Bergquist asked him why he had the substance on his person. Fox stated that he was cleaning up a friend's apartment, just threw everything in his pockets and was going to throw it away when he got home. Bergquist also found a .410-caliber shotgun slug in Fox's jacket pocket and a piece of sandwich bag that he again believed to be drug paraphernalia. He asked Fox where the rest of the sandwich bag was. Fox again explained that he had just cleaned out a friend's place, where he had picked all of these items up, and that he had intended to throw them all away when he got home.

Bergquist asked Fox where the gun was that went with the shell. Fox said he did not know what Bergquist was talking about. Bergquist asked if there was a gun in the car, and Fox denied that there was. At one point Fox said he had found the shell at his friend's residence while cleaning it; later during the traffic stop he told Bergquist he had never seen the shell before.

After the search, Bergquist placed Fox in the front seat of his cruiser. Bergquist's police dog remained caged in the backseat. Bergquist notified his dispatcher that he had placed Fox under arrest and asked for a license check. The dispatcher informed Bergquist that Fox's license was under suspension. Bergquist requested that a wrecker be sent to tow the sedan to the police station and asked Fox if there were any weapons in the car. Fox said he had a boot knife on his front seat. Bergquist then searched the sedan. He found a double-edged nine-inch-long knife sheathed on the front seat and a pistol-style shotgun under the seat, positioned with the handle closer to the driver's side and the barrel facing the rear. The gun, which appeared to be a single-shot shotgun, was in fairly dilapidated condition and had no trigger guard. Bergquist tried to clear it but was unfamiliar with the weapon and could not open the breach.

Bergquist needed to know whether the gun was loaded both for purposes of charging Fox

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resultant charges.

accurately (inasmuch as carrying a loaded weapon is a different offense from carrying an unloaded weapon) and, consistent with MSP policy, to render the gun safe for transport. Inasmuch as the gun lacked a trigger guard, any bumping or jostling could have caused it to fire if loaded.

Frustrated at his inability to open the breach, Bergquist carried the gun back to his cruiser and, standing approximately two feet or less away from Fox, asked him how to open the gun. Fox replied that he had never seen the gun before, was being set up and did not know what Bergquist was talking about. Bergquist – who at this point raised his voice and swore, telling Fox to "cut the shit" – told Fox that he had to make the gun safe and could do it in one of two ways: either by breaching it safely, which Fox had to tell him how to do, or by pulling the trigger.[2] However, Bergquist did not scream, point the gun at Fox or threaten to shoot him. Fox said that he did not know, but that it looked like if Bergquist pushed a certain button, the breach would open. Bergquist did so and was able to open the gun, which was loaded with a live .410-gauge shotgun shell.

Bergquist then completed his search of the sedan, which was towed and impounded for three days. Bergquist drove Fox to the York County Jail – approximately a forty-minute drive. He read Fox his *Miranda* rights from an MSP enforcement manual, illuminated by an interior car light, as he drove.[3] Bergquist asked Fox if he understood his rights. Fox replied, "Yeah, yeah, yeah, I've been through this before." Bergquist then told Fox he did not know what he had for white powder but thought it was heroin. Fox denied this, saying Bergquist could test it as much as he wanted and it was going to come back as baking soda.[4] Bergquist, who surmised that Fox was not going to tell him

[2] Bergquist testified that, although he theoretically could have shot the gun to disarm it, he would never do that. He testified that he could have called for backup to help him disarm it, but he expected it would have taken about forty minutes for another MSP trooper to respond.

[3] Bergquist made a mental note of the manner in which he read Fox his *Miranda* rights because he anticipated that Fox would complain that he was reading while driving.

[4] The substance was indeed subsequently identified as baking soda.

anything, asked no more questions *en route* to the jail.

At no point during the traffic stop did Fox say anything threatening to Bergquist or display a threatening demeanor.[5]

The next day, with the aid of MSP dispatch, Bergquist undertook some further investigation, discovering that the gun he retrieved from the sedan had been reported stolen. He returned to the York County Jail to question Fox further. At Bergquist's request, jail guards brought Fox to the booking area. Bergquist asked Fox if he remembered his *Miranda* warnings, and Fox said he did.[6] Bergquist explained that they still applied, stating, "If you don't want to talk to me you don't have to."

Bergquist explained that the gun had been reported stolen and told Fox that he wanted to hear his version of events. Fox said he knew nothing about it. Bergquist persisted, hoping to lock Fox into a statement and asking: "Am I clear that you did not touch the gun at all?" Fox stated, "If I remember correctly, I unloaded it for you last night." Bergquist reminded Fox that he had been handcuffed and had not done so. Fox then explained that he had been set up, stating that he had found the gun and two of the shells in the car when he came out of a grocery store. He told Bergquist that he had put the shells in his pocket and the gun under the seat and was going to throw them into the river. Bergquist asked why he found only one shell in Fox's pocket and one in the gun. Fox said he wanted to talk to a lawyer and accused Bergquist of having set him up. The interview ended. Fox never explicitly waived his *Miranda* rights.

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[5] The defendant, who testified at the suppression hearing, told a somewhat different story of his encounter with Bergquist, testifying among other things that (i) after Bergquist noticed the bulge in Fox's pocket, he drew his gun on Fox, (ii) Bergquist initially tried to force Fox into the backseat of the cruiser with his canine despite Fox's protests that he was terrified of dogs, and (iii) when Fox told Bergquist he did not know how to open the gun, Bergquist cocked the hammer back, placed the gun to Fox's head, called him a "fucking asshole" and said, "Maybe this will jar your memory." Bergquist denied that any of these incidents transpired. I do not find the defendant's testimony regarding them credible.

[6] At his suppression hearing, Fox acknowledged that (i) he was read his *Miranda* rights on the evening of the traffic stop (although he testified that a York County Jail officer read them to him during the booking process), and (ii) Bergquist asked him the following day (*continued on next page*)

Susan Jean Ewald, the owner of the sedan Fox was driving when stopped, had loaned it to Fox on the evening of December 21, 2002. All of her lights, including her plate lights, were working prior to that evening, and her plate lights were working when her car was returned to her after having been impounded by the MSP. Bergquist acknowledged that it may have snowed just prior to December 21, 2002 and that snow can cover plate lights and even part of the plates themselves.

II. Discussion

Fox has filed five separate motions to suppress; at oral argument, defense counsel reaffirmed that, with one caveat, he continued to press all five.[7] Inasmuch as the motions overlap to a degree, I address the points made along a time continuum.

A. Initial Vehicle Stop

Fox argues, as an initial matter, that Bergquist's stop of the sedan was impermissible inasmuch as Bergquist lacked any reasonable, articulable suspicion that Fox was violating the law. *See* First Motion at 2; Second Motion at 1-2. Fox posits that once Bergquist confirmed visually that the sedan did indeed have a license plate, thus dissipating his initial suspicions, he continued without adequate justification to follow the car. *See* First Motion at 2; Second Motion at 2-3.

As the First Circuit has observed:

> In *Terry v. Ohio*, [392 U.S. 1 (1968)], the Supreme Court first recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. This authority permits officers to stop and briefly detain a person for investigative purposes, and diligently pursue a means of investigation likely to confirm or dispel their suspicions quickly.

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whether he remembered the booking officer having read him his rights, to which he responded, "Yeah, I remember."

[7] On the strength of a representation by counsel for the government that the government would not seek to introduce any of the baking-soda dialogue between Bergquist and Fox *en route* to the York County Jail, defense counsel clarified that he no longer would press any point regarding the interval of time between the administration of *Miranda* warnings in the police cruiser and Bergquist's return to the jail the following day.

United States v. Trueber, 238 F.3d 79, 91-92 (1st Cir. 2001) (citations and internal punctuation omitted). The validity of an investigative *Terry* stop hinges on "whether the officer's actions were justified at their inception, and if so, whether the actions undertaken by the officers following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officers during the stop." *Id*. at 92 (citations and internal punctuation omitted). An "objective reasonableness standard" governs. *United States v. Moore*, 235 F.3d 700, 703 (1st Cir. 2000).

The government bears the burden of demonstrating the constitutionality of warrantless seizures and searches, including purported *Terry* stops. *See, e.g., United States v. Link*, 238 F.3d 106, 109 (1st Cir. 2001) ("Where a defendant challenges the constitutionality of a warrantless seizure undertaken on the basis of suspicion falling short of probable cause, the government bears the burden of proving that the seizure was a Terry-type investigative stop.") (citation and internal punctuation omitted).

As Fox acknowledges, an officer may effectuate a *Terry* stop if he or she has a reasonable articulable suspicion that a motorist is violating the law or committing a motor-vehicle infraction. *See* First Motion at 2.[8] Per Maine motor-vehicle law, a "vehicle must have a white light capable of illuminating the rear registration plate so that the characters on the plate are visible for a distance of at least 50 feet." 29-A M.R.S.A. § 1909. Bergquist could not verify – despite taking reasonable measures to do so – that the sedan's license-plate light met the requisites of section 1909. Thus, even

[8] Fox points out that a non-functioning plate light is not a safety hazard, *see* Second Motion at 2; however, an officer legitimately may stop a vehicle for a suspected minor motor-vehicle infraction. *See, e.g., State v. Taylor*, 694 A.2d 907, 909-10 (Me. 1997) (officer's articulable and reasonable suspicion that driver's plate light was defective justified *Terry* stop; "[s]uspicion of a civil violation provides adequate specific and articulable facts.").

if the light was in fact working or had been dimmed by a recent snow cover, the stop for further investigation was justified at its inception.

B. Pre-Arrest Detention and Questioning

Fox next posits that, in any event, Bergquist's seizure of Fox (by ordering him to stand with his feet apart and his hands on the cruiser's hood) was unjustified inasmuch as Bergquist had no reason to suspect that Fox, who was complying with all of Bergquist's requests, was a threat to himself or the public. *See* First Motion at 3; *see also generally* Third Motion. In so arguing, Fox takes too narrow a view of the totality of the circumstances. At the start of the encounter, Bergquist recognized Fox as someone whom he knew to have concealed lethal weapons, including brass knuckles and a loaded firearm, on his person and/or in his vehicle. Bergquist, who was out on patrol in a rural area alone (with his canine caged in the backseat of his cruiser), had also seen Fox ducking as if to grab something or place something under the seat. He then saw a fairly large bulge in Fox's jacket pocket. This sufficed to place Bergquist in objectively reasonable fear for his safety. Bergquist's order that Fox exit the sedan and lean on the cruiser, and the subsequent patdown search, were reasonable under the circumstances. *See, e.g., Florida v. J.L.*, 529 U.S. 266, 272 (2000) (given serious threat firearms and armed criminals pose to public safety, "*Terry*'s rule . . . permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause"); *United States v. Navarrete-Barron*, 192 F.3d 786, 791 (8th Cir. 1999) (limits of *Terry* stop not exceeded when suspect handcuffed while officers searched truck; "Several other circuits also have found that using handcuffs can be a reasonable precaution during a *Terry* stop."); *Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1030 (10th Cir. 1997) ("[A] *Terry* stop does not automatically elevate into an arrest where police officers use handcuffs on a suspect or place him on the ground.

Police officers are authorized to take such steps as are reasonably necessary to protect their personal safety and to maintain the status quo during the course of a *Terry* stop.") (citations and internal punctuation omitted).

In a related vein Fox argues that he was illegally arrested, and the sedan illegally searched, based on incriminating statements elicited from him by Bergquist without benefit of *Miranda* warnings. *See* First Motion at 3-4; Fourth Motion at 2-3.[9] Per *Miranda v. Arizona*, 384 U.S. 436 (1966), an accused must be advised prior to custodial interrogation "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 478-79. As the First Circuit has noted, "the target of a *Terry* stop must be advised of his *Miranda* rights if and when he is subjected to restraints comparable to those associated with a formal arrest." *Trueber*, 238 F.3d at 93 (citation and internal quotation marks omitted). "As a general rule, *Terry* stops do not implicate the requirements of *Miranda* because *Terry* stops, though inherently somewhat coercive, do not usually involve the type of police dominated or compelling atmosphere which necessitates *Miranda* warnings." *Id*. at 92 (citations and internal quotation marks omitted).

The government argues that Fox was not "in custody" for *Miranda* purposes prior to his formal arrest. *See* Response at 14-15. However, the government elsewhere in its brief makes an additional argument that bears on, and is dispositive of, this point: that Bergquist permissibly questioned Fox regarding weapons pursuant to the so-called "public safety exception" to the *Miranda* rule. *See id.* at

[9] I do not understand Fox to be seeking to suppress his pre-arrest statements concerning his criminal history and drug usage, but rather his pre-arrest statement disclosing his possession of brass knuckles, which he argues led to his arrest. *See* First Motion at 3-4; Fourth Motion at 2-3. In any event, the government represents that it does not plan to introduce drug-related statements in its case-in-chief. (*continued on next page*)

15-17.

As discussed above, under the circumstances Bergquist was placed in objectively reasonable fear for his safety. Specifically, he reasonably suspected – based on his observations that evening and his past history with Fox – that Fox had concealed a weapon in the bulging jacket pocket. Thus, even assuming *arguendo* that Fox was "in custody" prior to his actual arrest, the inquiry whether Fox had any weapons did not constitute a *Miranda* violation. *See, e.g.*, *United States v. Shea*, 150 F.3d 44, 48 (1st Cir. 1998), *recognized as abrogated on other grounds, United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000) (defendant's answer to agent's question whether he had any weapons admissible under *Miranda* exception established in *New York v. Quarles*, 467 U.S. 649, 659 (1984), for police questions "necessary to secure their own safety or the safety of the public") (citation and internal quotation marks omitted). Fox's arguments notwithstanding, *see, e.g.*, First Motion at 3-4, his arrest premised on the discovery of the brass knuckles, and the search of his car incident to arrest, hence were not the "fruit" of any "poisonous tree."[10]

C. Post-Arrest, Pre-*Miranda* Questioning

As defense counsel clarified at oral argument, Fox next challenges admission of any statements made post-arrest but pre-*Miranda* warnings, including those evidencing a knowledge of the location of weapons or other contraband and of the workings of the shotgun found in the sedan. As the government argues, *see* Response at 15-17, the public-safety exception to the *Miranda* rule again

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See Government's Consolidated Objection to Defendant's Motions To Suppress, etc. ("Response") (Docket No. 24) at 16 n.1.

[10] I understand Fox to be challenging his arrest and the sedan search on "fruit of the poisonous tree" grounds rather than attacking them directly. To the extent he does directly challenge their propriety, he falls short. In Maine, it is a Class D crime for a person to conceal "knuckles" under his or her clothes or about his or her person. *See* 25 M.R.S.A. §§ 2001, 2004. A warrantless vehicle search validly may be undertaken incident to the arrest of one of the vehicle's occupants. *See, e.g.*, *United States v. Infante-Ruiz*, 13 F.3d 498, 502 n.1 (1st Cir. 1994) ("[W]hen a police officer makes a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the car's passenger compartment and any containers found within it. The 'passenger compartment' has been interpreted to mean those areas reachable without exiting the vehicle and without dismantling door panels or

(*continued on next page*)

applies.

As Bergquist continued to search Fox following his arrest, he found a shotgun shell. He asked Fox where the gun was that went with the shell and whether there was a gun in the car. He also queried generally whether there were any weapons in the sedan. These questions were all permissible, and Fox's answers to them are admissible, under the public-safety exception. *See, e.g.*, *Shea,* 150 F.3d at 48-49 (defendant's answer to question whether he had any weapons admissible under public-safety exception when defendant was suspected of having committed armed robbery and the "question would have facilitated the securing of any weapons on [the suspect's] person whether or not the agent intended to conduct a search of the suspect.").

Likewise, Bergquist's questions regarding how to open the breach of the shotgun were permissible, and Fox's responses to those queries are admissible, pursuant to the public-safety exception. The shotgun had no trigger guard and could have fired if bumped or jostled. Under the circumstances, Bergquist understandably felt compelled to render it safe as quickly as possible. He was unable to figure out how to open the breach. Firing the seemingly dilapidated weapon was not a good option. Nor was waiting for up to forty minutes for backup help. Thus, Bergquist did what was reasonably necessary in the circumstances for his safety and the safety of any member of the public who might have chanced to drive or wander by: He sought the defendant's assistance in disarming the weapon. *See United States v. Thomas,* 190 F. Supp.2d 49, 62-63 (D. Me. 2002) ("The public safety exception affords an opportunity for the officers to take custody of the weapon in the safest possible manner, which may include asking Defendant whether or not it is loaded."); *see also, e.g., United States v. Newton,* 181 F. Supp.2d 157, 176 (E.D.N.Y. 2002) ("[A]n interrogation about a gun must

other parts of the car.") (citations and internal quotation marks omitted).

relate to an objectively reasonable need to protect the police or the public from any *immediate* danger associated with the weapon." (citation and internal quotation marks omitted) (emphasis in original).

The government does not argue that Bergquist's further post-arrest, pre-*Miranda* questions regarding Fox's drug paraphernalia and drug usage fit any exception to the *Miranda* rule. However, it represents that it does not plan to introduce any such evidence in its case-in-chief. *See* Response at 16 n.1. With the condition that the government be held to this representation, I recommend that Fox's motions, as they concern his post-arrest, pre-*Miranda* statements, be denied.

D. Jailhouse Questioning

Fox finally argues that any statements he made while in the custody of York County Jail were not given pursuant to an unambiguous, voluntary and knowing waiver of his rights. *See* Fifth Motion at 1. He contends that Bergquist (i) at no point administered *Miranda* warnings prior to the jail interrogation and (ii) deliberately elicited incriminating responses in violation of *Massiah v. United States,* 377 U.S. 201 (1964). *See id*. at 2-3.

The contention that Fox never received any *Miranda* warnings was not borne out at hearing. Bergquist administered *Miranda* warnings *en route* to the York County Jail on the evening of the traffic stop. He reminded Fox of those warnings prior to questioning him the following day at the jail, and Fox indicated he understood them. In view of that acknowledgement, Bergquist's reminder sufficed. There was no need to re-read the *Miranda* warnings in their entirety. *See, e.g., United States v. Andrade,* 135 F.3d 104, 107 (1st Cir. 1998) ("Here, we have no reason to doubt that Andrade knew that he had a right to remain silent; at the outset of the second round [of questioning], Campbell reminded him of the earlier [*Miranda*] warnings, and Andrade confirmed that he remembered.").

One question remains: whether Fox knowingly, voluntarily and intelligently waived his

Miranda rights. On this issue, the government bears the burden of proof by a preponderance of the evidence. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 168 (1986). Fox did not explicitly waive his rights; however, that is not in itself fatal. A written waiver, while helpful to the government, "is not a mechanical requirement." *Andrade*, 135 F.3d at 108 (footnote omitted). While "mere silence" does not suffice to telegraph a waiver, "this does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that the defendant has waived his rights." *Id*. at 107 (citation and internal quotation marks omitted). Before commencing the jailhouse interrogation on December 22, 2002, Bergquist reminded Fox that he did not have to talk to him. Fox, who had received full *Miranda* warnings the previous evening and had been arrested on at least one other, earlier occasion, understood this. When the questioning took a turn that he did not like, he terminated it and asked for a lawyer. In short, he knew he did not have to talk, but chose to do so until he perceived it to be to his disadvantage. His course of conduct evidences a voluntary, knowing and intelligent waiver of his *Miranda* rights.[11]

III. Conclusion

For the foregoing reasons, I recommend that the defendant's five motions 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

[11] *Massiah* is distinguishable inasmuch as there the Court held that "the petitioner was denied the basic protections of that [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah*, 377 U.S. at 206. There is no indication here that, once Fox invoked his right to counsel, Bergquist or anyone else attempted to interrogate him further.

which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 12th day of August, 2003.

_____
David M. Cohen
United States Magistrate Judge

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