UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	*Criminal No. 02-114-P-H*
	)	
GERALD JOSEPH GAGNON,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Gerald Joseph Gagnon, charged in one count with being a felon in possession of a firearm (a Ruger model P95DC nine-millimeter semi-automatic pistol) and in another with being a felon in possession of ammunition (twelve nine-millimeter bullets contained in two magazines) in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), seeks to suppress the firearm and ammunition as well as incriminating statements made to Lewiston, Maine police during an encounter on August 27, 2002. Indictment (Docket No. 1); Motion To Suppress ("Motion") (Docket No. 4).

An evidentiary hearing was held before me on December 23, 2002 at which the defendant appeared with counsel. At the conclusion of the hearing, defense counsel argued his case orally. Counsel for the government declined an opportunity for oral argument, preferring to rest on the papers previously submitted. I now recommend that the following findings of fact be adopted and that the Motion be denied.

I. Proposed Findings of Fact

On August 27, 2002, at approximately 9:45 p.m., Lewiston Police Department ("LPD") officer Ryan Rawstron was on patrol alone in his cruiser in the Ash Street area of Lewiston when he received

a report from his dispatcher, directed to himself and an LPD officer on patrol in a separate cruiser, Raymond W. Roberts, that an intoxicated male was passed out near the back parking lot of 88 Ash Street.[1]

Rawstron was familiar with 88 Ash Street, a five-story, L-shaped apartment building housing elderly and emotionally disturbed residents and located near "The Cage," a bar to which he previously had been called to deal with intoxicated individuals and to intercede in fights. Per LPD policy, Rawstron's practice in confronting an unconscious person was to see if he could rouse him or her, then ask questions calling for identification of the day, time, the person's address and the like. Rawstron would then determine whether the person could carry on a rational conversation and safely could be sent home or needed to be transported to a hospital via ambulance (perhaps even involuntarily if necessary). Calls to investigate incapacitated persons generally did not result in arrests.

Rawstron had been trained that it was a liability simply to leave an incapacitated person out on the street without further investigation. The person might be a danger to him or herself (*i.e.*, unable to walk up stairs or apt to fall asleep in the middle of the road or under a car) or to others (*i.e.*, agitated enough to start a fight or mug someone). In fact, Rawstron believed that he would be subject to disciplinary action if he chose simply to leave an incapacitated person alone.

Upon receiving the dispatch in question on the night of August 27, 2002, Rawstron drove immediately to 88 Ash Street. He parked and disembarked from his cruiser, advising his dispatcher of his status. It was dark outside, although the scene was illuminated by streetlights and porch lights from 88 Ash Street. As Rawstron walked toward the building, he saw a male dressed in a t-shirt, shorts and a denim jacket lying on the ground with his head toward the apartment building and his feet facing

[1] Specifically, the dispatcher advised, "88 Ash, 88 Ash, we have a male intox stumbling about, now she [the caller] believes he's (*continued on next page*)

the parking lot. Rawstron neither smelled nor saw alcohol, but his "working hypothesis" was that the man was intoxicated. Rawstron stopped about fifteen feet away from the prone man (whom he identified in court as Gagnon) and called out a couple of times, "Lewiston Police – wake up." Gagnon opened his eyes and looked at Rawstron, closed his eyes and opened them again. He then jumped up and attempted to run away – *i.e.*, trying to move his feet faster than a walking pace but stumbling. In Rawstron's experience, which included dealing with approximately forty incapacitated people prior to August 2002, no other seemingly intoxicated person had responded to a police wakeup call by attempting immediately to flee.

Rawstron called out three times for Gagnon to stop. After Gagnon had gone fifteen to twenty feet, he did stop in response to the third command. Rawstron then noticed that Gagnon's left jacket pocket seemed weighted down with something heavy and bulging.[2] Rawstron was concerned; from his training, he believed the heavy object could be a gun or possibly a knife or small aluminum baseball bat. He ordered Gagnon to put his hands on top of his head.[3] Gagnon did so. Rawstron then commanded Gagnon to turn a full three hundred and sixty degrees, but Gagnon stopped halfway and began turning in the opposite direction – in Rawstron's opinion, to shield the left pocket from view. Rawstron, a medium-built man who weighs 165 pounds, then advised Gagnon, a heavier set man weighing approximately fifty pounds more, that he was not under arrest but that he was going to pat him down for safety reasons. Rawstron ordered Gagnon to keep his hands on top of his head and, in preparation for the patdown, placed one of his own hands on top of Gagnon's hands. Gagnon freed his

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passed out. As you're looking to the building, it'll be the left side nearest to the back parking lot."

[2] Although I found Rawstron generally a credible witness, I do discount his testimony that he first noticed the bulge in Gagnon's jacket when Gagnon got up from the ground, which is inconsistent with both his initial written report and a report prepared the next day by special agent Randy St. Laurent with Rawstron's assistance, both of which indicated that Rawstron did not notice the weighted pocket until after he stopped Gagnon by voice command. *See* Defendant's Exhs. 8 & 26.

[3] Rawstron's training was that, for safety, an officer must be able to see a person's hands; the hands "are what will end up hurting or

(*continued on next page*)

hands, put one hand down and pulled his jacket closed. Rawstron repositioned Gagnon's hands on top of his head and ordered him to keep them there. Rawstron patted down Gagnon's left side and felt the handle of a gun. He pulled the object out; it was indeed a Ruger nine-millimeter gun. He then ordered Gagnon to the ground and radioed his dispatcher to speed up Roberts' arrival. Gagnon tried several times to get up, and Rawstron each time ordered him back to the ground. Rawstron was in the process of handcuffing Gagnon when Roberts arrived.

Rawstron handed Roberts the gun, which Roberts held downward, pointing away from himself, Gagnon and Rawstron. Rawstron, who had been trained that a person found carrying one weapon may be harboring another, searched the still-face-down Gagnon more thoroughly. This search yielded a magazine loaded with four bullets, which Rawstron retrieved from Gagnon's left inner pocket. Roberts returned the Ruger to Rawstron and helped the still-handcuffed Gagnon to his feet. At that time Roberts noted that Gagnon's breath smelled strongly of alcohol and his eyes were bloodshot. Rawstron emptied the Ruger, which was loaded and ready to fire, with several rounds in its magazine and one in its chamber, then placed it in his pocket.

Gagnon asked Roberts why he was being arrested. Roberts explained that he was not under arrest and that the officers originally responded to a medical call but that Gagnon now was being detained because he had been found in possession of a weapon. This question and answer were repeated several times. Rawstron asked Gagnon if he had a concealed-weapons permit; Gagnon replied that he did not. Roberts also asked Gagnon several questions, including where he was coming from (Gagnon said The Cage), what he was doing in a bar if he was carrying a gun (Gagnon said it was not his gun) and whose gun it was (Gagnon said it was his girlfriend's).

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killing you."

Using identification that Roberts had obtained from Gagnon's wallet, the officers requested a warrant check. Their dispatcher verified that there was an outstanding warrant for Gagnon's arrest on charges of negotiating a worthless instrument. The officers then notified Gagnon that he was under arrest on the outstanding warrant and for concealing a gun without a permit. At no time that evening was Gagnon given any *Miranda* warnings.[4]

In Rawstron's mind, once he found the gun the LPD's function changed from one of "caretaking" to one of "investigation." Rawstron never asked Gagnon the questions he usually asks to determine whether an incapacitated person is safe to go home; nor, although he was trained as a "first responder," did he check vital signs, administer any kind of first aid or call an ambulance. In the interim between the stop of Gagnon and receipt of the results of the warrant check, both Rawstron and Roberts considered Gagnon to be detained for investigative purposes, not placed under arrest. Roberts considered it unnecessary to administer *Miranda* warnings until such time as Gagnon was formally placed under arrest. Even when suspects are formally placed under arrest, Roberts testified that he typically does not read *Miranda* warnings at an arrest scene but rather waits until a suspect is taken to a well-lit room at the station house, where the warnings can be explained and the suspect can sign a form. Rawstron did not consider his or Roberts' questions "interrogation" of the kind that would trigger a need for *Miranda* warnings. In addition, Rawstron testified that he asked the concealed-weapons question for Gagnon's own benefit, not to incriminate him.

II. Discussion

At oral argument, defense counsel framed the instant motion as implicating two issues: whether

[4] 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-
(*continued on next page*)

the LPD properly effectuated a so-called "*Terry* stop" and whether the defendant's statements should be excluded because *Miranda* warnings were not read. I address each in turn.

A. *Terry* Stop

Defense counsel posited at oral argument that (i) the facts adduced at hearing showed that the LPD approached Gagnon to perform a caretaking function, (ii) the officers were justified in approaching him to fulfill this function, (iii) but they had no business stopping him when he tried to walk away. 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.

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

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of proving that the seizure was a Terry-type investigative stop.") (citation and internal punctuation omitted).

In its papers, the government argued that the LPD effectuated an appropriate *Terry* stop. *See* Government's Opposition to Motion To Suppress ("Opposition") (Docket No. 5) at 3-5. While the government did not there contend that the caretaking function, in itself, justified the stop in issue, the question was squarely presented at hearing.[5] In closing argument, defense counsel posited the converse – that caretaking could not justify the detention and patdown of Gagnon in this case – a proposition for which he cited *United States v. Novitsky*, 208 F. Supp.2d 1181 (D. Colo. 2002).

The *Novitsky* court noted:

> In the course of exercising this noninvestigatory [community caretaking] function, a police officer may have occasion to seize a person, as the Supreme Court has defined the term for Fourth Amendment purposes, in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity.
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> ***
>
> However, a person's Fourth Amendment rights are not eviscerated simply because a police officer may be acting in a noninvestigatory capacity for it is surely anomalous to say that the individual is fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. Whether the seizure of a person by a police officer acting in his or her noninvestigatory capacity is reasonable depends on whether it is based on specific articulable facts and requires a reviewing court to balance the governmental interest in the police officer's exercise of his or her community caretaking function and the individual's interest in being free from arbitrary government interference.

Novitsky, 208 F. Supp.2d at 1185 (quoting *United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993)) (internal punctuation omitted). While the *Novitsky* court recognized the existence of a caretaking-type justification for a *Terry* stop, it found that officers in that case exceeded reasonable

[5] In its papers, the government primarily and unhelpfully relied on an argument that the LPD possessed a reasonable and articulable suspicion that Gagnon was violating a public-intoxication statute, 17 M.R.S.A. § 2003-A. *See* Opposition at 5. The facts adduced at (*continued on next page*)

bounds when, in the course of responding to a "man down" distress call, they placed Novitsky in an "arrest control hold" and patted him down for weapons without any suspicion that he had committed a crime, was armed or otherwise posed a threat to safety. *Id*. at 1186.

In closing argument, defense counsel maintained that (i) Gagnon simply walked away, rather than attempting to flee, (ii) Gagnon reasonably construed the officer's command to "wake up" as an order to move along, with which he complied, and (iii) as in *Novitsky*, there was no *bona fide* concern for Gagnon's or anyone else's safety. I disagree. First, I find that Gagnon was actively attempting to flee the officer – that is, moving away as quickly as his condition would permit. As the Supreme Court has noted, "Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Second, I find that unprovoked flight by a seemingly intoxicated person would raise in a reasonable officer (and did in fact raise in Rawstron) concern for the safety of the fleeing individual and the public in general. Third, I find Rawstron's action in ordering Gagnon to stop (thereby effectuating a *Terry* stop) entirely reasonable under the circumstances. In fact, as Rawstron suggested at hearing, he could have been considered derelict in his duty not to have satisfied himself that Gagnon was safe to continue on his way. *See Winters v. Adams*, 254 F.3d 758, 764 (8th Cir. 2001) (recognizing validity of community-caretaking type of *Terry* stop; noting that officers would have been derelict in duties to have walked away, permitting possibly intoxicated individual to drive car).

Fourth, I find that Rawstron's pat-down of Gagnon was, again, entirely reasonable and did not exceed the scope of the *Terry* stop. The hour was late, Rawstron (who still at that point was alone)

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hearing did not bear this out.

was much smaller than Gagnon, Gagnon was in addition to his size seemingly intoxicated, and Rawstron detected a tell-tale bulge and weight in Gagnon's jacket pocket. *See 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"). Rawstron employed the least intrusive means (the pat-down) to assuage his well-founded concerns.

Fifth and finally, I find that once Rawstron discovered the weapon, he reasonably ordered Gagnon to the ground for handcuffing and further search. In Rawstron's experience, persons concealing one weapon often harbored another. Rawstron's backup officer had not yet arrived, and Gagnon had not been fully compliant with Rawstron's voice commands. A reasonable officer in Rawstron's shoes would have feared, at a minimum, for his own safety – and the evidence is that Rawstron was in fact concerned. The use of handcuffs as a precaution under the circumstances, while a strong measure, did not in itself convert the *Terry* stop to a full-blown arrest. *See, e.g., 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).

Shortly after handcuffing Gagnon, the officers developed probable cause to arrest him based both on the discovery of an outstanding warrant for his arrest and his carrying of a weapon without a concealed-weapons permit. At that point, the *Terry* stop matured into a full-blown, official arrest.

The bottom line: Rawstron reasonably (i) commanded Gagnon to stop, (ii) patted him down and seized the gun upon noticing the weighted pocket, (iii) ordered him to the ground, (iv) handcuffed him and (v) held him pending further brief investigation establishing that Gagnon was wanted on an outstanding warrant and was carrying a concealed weapon without a permit. At no point were the bounds of a *Terry* stop exceeded, in length of stop or in means of detention. Hence, the motion to suppress, as it pertains to the seizure of the Ruger gun and ammunition, should be denied.

B. Unwarned Statements

As it happens, analysis of Gagnon's bid to suppress his unwarned statements overlaps to a considerable degree with the *Terry*-stop inquiry undertaken above. "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." *Trueber*, 238 F.3d at 92 (citations and internal quotation marks omitted).

In particular, an officer undertaking a *Terry* stop "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *United States v. Jones*, 187 F.3d 210, 218 (1st Cir. 1999) (citation and internal quotation marks omitted); *see also, e.g.*, *Trueber*, 238 F.3d at 93 (court must determine "whether and when a reasonable person in [a detainee's] position would have believed that he was actually in police custody and being constrained to a degree associated with formal arrest (rather than simply undergoing a brief period of detention at the scene while the police sought by means of a moderate number of questions to determine his identity and to obtain information confirming or dispelling their suspicions")) (citation and internal quotation marks omitted).[6]

[6] The government's brief with respect to the issue of the statements again is unhelpful inasmuch as predicated on what proved to be an (*continued on next page*)

Here, although Gagnon was handcuffed while being questioned, I conclude that a reasonable person in his position would have understood that he was being detained at the scene while Rawstron and Roberts asked a moderate number of questions to obtain information confirming or dispelling their suspicions concerning his possession of the Ruger and ammunition. When Rawstron first patted Gagnon down, he expressly stated that Gagnon was not under arrest. When Gagnon asked Roberts several times why he was being arrested, Roberts explained that he was not under arrest but was being detained because he was found in possession of a weapon. *See Trueber*, 238 F.3d at 92 ("officers' intentions relevant . . . to the extent that they were communicated to the defendants") (citation omitted). The questions asked were few, brief and reasonably related to the discovery of the weapon – *e.g.*, Do you have a concealed weapons permit? Where are you coming from? Whose gun is it? Finally, while defense counsel suggested at hearing that the officers brandished Gagnon's own gun in front of him in a coercive or intimidating manner, the evidence established that, for safety reasons, the gun (while perhaps visible to Gagnon) was deliberately pointed away from him until it was disarmed, at which point Rawstron pocketed it. There is no evidence that either officer drew his own weapon.

In sum, Rawstron and Roberts did precisely what is permitted in the context of a *Terry* stop in the absence of *Miranda* warnings: they "pursue[d] a means of investigation that was likely to confirm or dispel their suspicions quickly." *Id*. In such circumstances, lack of a *Miranda* warning is not a bar to admissibility of statements made in response. *See, e.g., id*.

In oral argument and in his papers, defense counsel contended that Gagnon's statements were inadmissible not only because unwarned but also because involuntary. *See* Motion at 3, Reply at 8-10.

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incorrect assumption: that Gagnon volunteered the statements in issue. *See* Opposition at 5-7. Defense counsel alluded to the body of law relevant to the evidence adduced at hearing, acknowledging that "Terry detentions do not trigger the same safeguards as formal arrest[.]" *See* Defendant's Response to the Government's Objection to the Motion To Suppress, etc. ("Reply") (Docket No. 6) at 8.

An alleged confession "must be the product of a rational intellect and a free will." *United States v. Holmes*, 632 F.2d 167, 168 (1st Cir. 1980) (citation and internal quotation marks omitted). While mental history or state is pertinent to voluntariness, "the precedents still require some degree of coercion or trickery by government agents to render a statement involuntary[.]" *United States v. Santos*, 131 F.3d 16, 19 (1st Cir. 1997); *see also Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998) ("A confession or other admission is not deemed coerced or involuntary merely because it would not have been made had the defendant not been mentally defective or deranged. The relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers.") (citation omitted).

The evidence shows that, however inebriated Gagnon may have been, he was able to ask rational questions and provide rational responses to the officers' questions. Moreover, while defense counsel posited at oral argument that the LPD has a deliberate policy of encouraging defendants in custody to make un-*Mirandized* statements, the evidence does not bear out the proposition that coercive or abusive tactics were employed in this case. Instead, as discussed above, the officers' conduct and questioning were reasonably related to the circumstances they confronted, as those circumstances were evolving, on the evening of August 27, 2002.

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

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 2nd day of January, 2003.

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David M. Cohen
United States Magistrate Judge

TRLLST CJACNS

U.S. District Court
District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 02-CR-114-ALL

USA v. GAGNON Filed: 10/22/02
Dkt# in other court: None

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