

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA

PLAINTIFF

v.

CRIMINAL ACTION NO. 3:98CR-67-S

WILFREDO JAMBU

DEFENDANT

MEMORANDUM OPINION

This matter is before the court for consideration of the Findings of Fact, Conclusions of Law, and Recommendation of United States Magistrate Judge C. Cleveland Gambill and the objections thereto. Wilfredo Jambu, one of the defendants, has filed three related motions to suppress evidence from an interrogation of Jambu, from a search of his apartment, and from a search of a vehicle. Magistrate Judge Gambill conducted a hearing on the matter, and after consideration of the evidence and arguments of counsel, recommended that the motions to suppress be denied.

Jambu filed objections to the Magistrate Judge's findings of fact and conclusions of law. In accordance with 28 U.S.C. § 636(b)(1)(C), this court must conduct a *de novo* review of the record and those portions of the report of the Magistrate Judge to which objections have been filed. As this court finds key facts are different than those found by the Magistrate Judge, we will grant defendant's motions to suppress by separate order.

FACTS

A full statement of the facts in this case regarding the drug investigation prior to the stop of Jambu's vehicle can be found in the Magistrate Judge's Recommendation. For purposes of clarity, a brief summary of those facts follows before a more detailed account of the stop of Jambu's car and the events thereafter.

On May 1, 1998, Jambu came under suspicion of participating in drug trafficking by the Joint Task Force of the Drug Enforcement Administration and the Metro Narcotics Squad of the Jefferson County Police Department. The officers involved knew, through a confidential informant, that a drug deal was to occur at 9:00 P.M. that evening at the home of Francisco Portuondo-Gonzalez, located at 5120 Patterson Drive in Jefferson County, Kentucky. Although Jambu was not previously a suspect in the investigation, the officers observed Jambu travel to and from that location several times on May 1, including a stop at 8:30 P.M., during which he dropped off a package. After a search warrant was executed at the Patterson Drive location and five kilograms of cocaine were discovered, officers observed Jambu driving from his apartment in the direction of the Patterson Drive house. At some point, Jambu deviated from that route, and the officers believed that their surveillance had been discovered and Jambu was attempting to evade them.

Officers of the Task Force stopped Jambu's vehicle in a parking lot by blocking the car with several police vehicles. The purpose of the stop was for investigation, specifically because the officers thought Jambu may have been in possession of an additional two kilograms of cocaine and because they thought he may have information relevant to their investigation. Several vehicles were involved in the stop, in which officers approached with their guns drawn, yelling, "Police! Police! Get your hands up!" Jambu and his passenger were ordered out of the car at gunpoint. As he exited the vehicle, Jambu was in the physical control of the officers, and he was told to place his hands on the car while a pat-down search was conducted. Neither this pat-down nor a search of the vehicle produced any weapons or drugs.

Some time after the stop, Lt. David Mottley, one of two lieutenants in charge of the investigation that day, arrived at the scene. Custody of Jambu was given to Mottley, who immediately handcuffed Jambu. Although the testimony is unclear, the United States asserts that Jambu was also placed in a police van at this time. Jambu was read his Miranda rights in English, and then interrogated by Mottley. According to Mottley, Jambu denied being at the Patterson

location that day or dropping anything off there, but then changed his story when confronted by Mottley's assertion that he had been under surveillance.

Detective Rodney Seelye then prepared a consent to search form, authorizing Seelye, Mottley, and Sgt. Phil Williams to search Jambu's apartment, which Jambu signed. A search of Jambu's apartment was then commenced, with four or five officers involved, including at least one agent of the Internal Revenue Service. Items were seized from Jambu's apartment, and then Jambu was asked about a Ford Mustang parked in the apartment building parking lot, specifically whether his keys, seized by the officers, fit that vehicle. Jambu denied the Mustang was his and instead gave consent to the officers to search a Ford Tempo which belonged to him. Evidence was also seized from the Ford Tempo.

DISCUSSION

Jambu challenges the initial stop of his vehicle, his alleged waiver of his Miranda rights, and the alleged consents to search his apartment and Ford Tempo. In addition to the facts articulated above, Jambu maintains that he does not understand English sufficiently to know the rights he was waiving. Finally, Jambu argues that the scope of his consent was exceeded when officers other than the three specifically listed in the consent to search form entered his apartment.

The Stop of Jambu's Vehicle

Clearly, the stop of Jambu's vehicle constitutes a seizure within the meaning of the Fourth Amendment. Sgt. Thompson testified that Jambu's vehicle was stopped for investigatory purposes, in order to identify Jambu and to see if his vehicle contained the "missing" two kilograms of cocaine. If valid, such a stop would constitute an investigatory detention under *Terry v. Ohio*, 392 U.S. 1 (1968). Jambu claims that the initial stop was invalid, and that, even if the stop was valid, Jambu's subsequent arrest was not supported by probable cause.

The determination of whether a seizure constitutes an investigative stop, rather than an arrest, requires us to examine the reasonableness of the stop under the circumstances. *United States v. Hardnett*, 804 F.2d 353, 356 (6th Cir. 1986). Two factors are involved in this examination: 1) “whether there was a proper basis for the stop,” and 2) “whether the degree of intrusion into the suspect’s personal security was reasonably related in scope to the situation at hand.” *Id.*(citing *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968)).

Whether a proper basis for the stop existed is judged by examining whether the officers had specific and articulable facts which gave rise to a reasonable suspicion. In support of a finding that reasonable suspicion existed, the United States advanced these circumstances: 1) Jambu was seen at the Patterson location several times on May 1st, 2) Jambu was seen carrying something into the Patterson location at 8:30 P.M., one half hour prior to the 9:00 P.M. drug deal, 3) Jambu might have had in his possession two kilograms of cocaine that the police believed existed but had not been recovered, and 4) Jambu made “evasive maneuvers” in his vehicle sometime after the drug deal was to have occurred.

In examining these grounds, this court notes that none of them alone clearly is indicative of criminal activity. The fact that Jambu *might* have had two kilograms of cocaine was a hunch, based only upon the surveillance of the Patterson location and Jambu’s visits to that house during the day. The “evasive maneuvers” testified to by Sgt. Thompson are that Jambu did not return to the Patterson location as expected, and that he drove slowly through a parking lot.¹ While several of the circumstances relied upon by the United States could constitute innocent activity if considered in a vacuum, we conclude that taken together, they are sufficient to meet the standard of “reasonable suspicion.” We therefore find that the officers had a proper basis to make the initial stop of Jambu.

¹ The court notes the likelihood that if Jambu has sped through the parking lot, that the officer would have considered this to be evidence of “evasive maneuvers” as well; thus we do not attribute great significance to the fact that he drove slowly.

Turning to the second factor, we must “examine whether the officers’ actions escalated the investigative stop into an arrest.” *Hardnett*, 804 F.2d at 357. The government concedes that Jambu was arrested, but contends that the arrest occurred when Mottley, after interrogating Jambu, decided to arrest him. We first observe that an investigatory stop is a “narrowly drawn” exception to the probable cause requirement of the Fourth Amendment. *United States v. Sharpe*, 470 U.S. 675, 689 (1985)(Marshall, J., concurring). Thus, “[t]he scope of activities during an investigatory detention must be reasonably related to the circumstances that initially justified the stop.” *United States v. Richardson*, 949 F.2d 851, 856 (6th Cir. 1991)(citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985)).²

Factors involved in this examination of reasonableness include: 1) use of weapons or bodily force, 2) significant restraints on the detainee’s freedom of movement involving physical confinement or other coercion, and 3) whether the officers informed the defendant that he was free to leave. *United States v. Richardson*, 949 F.2d 851, 857 (6th Cir. 1991). Here, police vehicles blocked in Jambu’s vehicle. Weapons were displayed and pointed at Jambu as he was ordered to exit his vehicle under the physical control of the officers. Once Jambu and his vehicle were searched for weapons, the officers holstered their guns. Jambu was not initially handcuffed. When Lt. Mottley arrived on the scene later, he felt it was necessary to handcuff Jambu for the safety of the officers and for the safety of Jambu.³ This was a significant restraint upon Jambu’s freedom of

² We note the similarity between *Richardson* and the instant case. In both cases, the police did not have any hard evidence of any crimes, but rather mere suspicions based upon the fact that the defendant was associating with individuals known to be involved in the distribution of drugs. In the *Richardson* case, the Sixth Circuit found that the line between a *Terry* stop and an arrest had been crossed once the defendant was placed in the back of a police car after he refused consent to search his storage locker.

³ The record is unclear as to whether Jambu was also placed in a police van. The Magistrate Judge found he was not, but the United States in their Memorandum (Docket #139) asserts that he was placed in a police van “to avoid undue humiliation to Jambu” while he was being interrogated. If Jambu was placed in a police van in addition to being handcuffed, this would add additional
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movement. Jambu was not handcuffed because he was uncooperative; in fact, the officers' testimony is that Jambu was cooperative. No weapons had been found on him, on his passenger, or in his vehicle. When Lt. Mottley arrived with two additional officers, at least six officers were then present at the scene. It is significant that neither Mottley nor any other officer involved ever told Jambu he was free to leave at any time. Thus, "the detention of [defendant] was in important respects indistinguishable from a traditional arrest." *Dunaway v. New York*, 442 U.S. 200, 212 (1979).

The actions of the officers here exceeded permissible bounds because they were not reasonably related to the circumstances that justified the stop. The blocking of Jambu's vehicle may have been reasonable if they expected him to attempt to flee. *United States v. Hardnett*, 804 F.2d 353, 357 (6th Cir. 1986). The drawing and pointing of guns at Jambu may have been reasonable if the officers had a "justifiable fear for [their] personal safety." *Id.* However, at the time Mottley handcuffed Jambu it had been determined that Jambu was not armed and he had been cooperative. Handcuffing him and not informing him that he was free to leave were not reasonably related to the circumstances justifying the stop. Thus, the actions of the officers escalated the investigative stop into an arrest at that point. *Id.*

When a seizure rises to the level of an arrest, it must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 207 (1979). By this point in time, the officers had even less to support a finding of probable cause than they did to support the initial stop of Jambu's vehicle. They did not find any incriminating evidence, in particular the "missing" two kilograms of cocaine. While the facts cited in support of stopping Jambu amounted to reasonable suspicion, they do not amount to probable cause that Jambu committed or was committing a crime, especially when the

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weight to the conclusion that he was in fact arrested at that point. However, we do not make a decision on that fact, as it is not necessary for our ruling.

suspicion of the two kilograms dissipated once the searches of Jambu and his vehicle turned up nothing. Therefore, we conclude that Jambu was arrested without probable cause prior to his interrogation by Lt. Mottley.

Suppression of Evidence

Having concluded that Jambu's arrest was without probable cause, we now turn to whether statements he gave and evidence the police recovered should be suppressed as a result of that illegality. We find neither the statements made by Jambu nor the consents to search given by him sufficiently attenuated from the illegal seizure of Jambu, and we therefore suppress both the statements and the evidence taken from Jambu's apartment and vehicle.

With regard to the oral statements made to Lt. Mottley, we do not reach the issues of whether Jambu was properly given his *Miranda* warnings by Lt. Mottley and whether he then validly waived those rights. The statements may well be "voluntary" for purposes of the Fifth Amendment. However, we need not draw that conclusion as the statements are not voluntary under the Fourth Amendment. The Supreme Court has held that we must determine whether Jambu's "statements were obtained by exploitation of the illegality of his arrest." *Brown v. Illinois*, 422 U.S. 590, 600 (1975). Relevant factors include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Brown*, 422 U.S. at 600 (1975); *Dunaway v. New York*, 442 U.S. 200, 218 (1979). We find all of these factors to weigh against the admission of Jambu's statements to Lt. Mottley. The statements were made immediately after his arrest, with no intervening circumstances, and with Jambu handcuffed. The causal chain between the arrest and the subsequent statements is unbroken, and the statements must therefore be suppressed.

The same analysis and the same rationale applies to Jambu's consent to search his apartment as well. *United States v. Richardson*, 949 F.2d 851, 858 (6th Cir. 1991). The Sixth Circuit has stated that, "[t]he law is quite clear that a consent given after unlawful treatment . . . is generally not valid."

United States v. Kelly, 913 F.2d 261, 265 (6th Cir. 1990). The consent to search the apartment was made during Mottley’s interrogation. Jambu was still handcuffed this entire time, as Lt. Mottley testified that he had to remove one of Jambu’s arms from his handcuffs in order for Jambu to sign the consent form the police had prepared. As in the *Richardson* case, “we do not believe the taint had dissipated” at the time of the consent to search. *Id.* at 859.

The consent to search the Ford Tempo occurred an hour or two after Jambu’s arrest.⁴ Although Jambu had been given his *Miranda* warnings, “the Government has a heavy burden of proof in establishing that the consent was the voluntary act of the arrestee and was not the fruit of the illegal arrest,” and the reading of *Miranda* rights alone is insufficient to show voluntariness. *United States v. McCaleb*, 552 F.2d 717, 721 (6th Cir. 1977). Jambu was still handcuffed in his own apartment with quite a number of officers, state and federal, searching his house on the basis of the consent we find to be invalid. Using keys that were either taken from Jambu or found in his apartment, the officers interrogated Jambu further about ownership of a Ford Mustang before he gave oral consent to search his own Ford Tempo. The scenario from invalid arrest to search of the apartment to search of the car was seamless from a legal analysis standpoint. Jambu remained handcuffed during most of this time, and he had been transported in custody from the parking lot to his apartment, where he remained restrained. We find the consent to search the vehicle was not sufficiently attenuated from the initial arrest to permit us to validate it. Thus, the evidence seized from the Ford Tempo must be suppressed. The statements made by Jambu at his apartment, during the search, must also be suppressed for the same reasons.

To sum up, the initial arrest of Jambu without probable cause became a “poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471 (1963). The subsequent searches of Jambu’s apartment and car are limbs sprouting directly from that tree. Factually and temporally, the various *Miranda*

⁴ Although Jambu and his wife both testified that he gave no such consent, we need not determine whether that testimony was credible.

warnings and the various consents given by Jambu cannot salvage from suppression the fruit gained from those limbs.

Scope of the Invalid Consent

Jambu has also raised the issue of whether the officers exceeded the scope of the consent Jambu gave to search his apartment. Under these facts, we agree with the Magistrate Judge that the fact that Jambu's apartment was searched by five officers, rather than the three mentioned specifically in the consent form does not, ipso facto, intrude upon any of Jambu's privacy rights.

CONCLUSION

Having concluded that the stop of Jambu escalated into an arrest without probable cause, and that the statements of Jambu and his consents to search are not sufficiently attenuated from that illegality, the motions of the defendant Wilfredo Jambu to suppress those statements and the evidence taken from his apartment and the Ford Tempo will be **GRANTED**.

This ____ day of _____, 1998.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

The above matter having been referred to United States Magistrate Judge C. Cleveland Gambill, and the Magistrate Judge having filed his Findings of Fact, Conclusions of Law, and Recommendation, and objections having been filed, and the court having made a *de novo* determination of those portions of the Magistrate Judge's proposed Findings of Fact, Conclusions of Law and Recommendation to which objections have been made.

IT IS ORDERED AND ADJUDGED that the motions of the defendants for suppression of evidence be, and they are, hereby **GRANTED**.

IT IS SO ORDERED this ____ day of _____, 1998.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record