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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	*	
V.	*	Criminal No. 06-CR-00025-PB
[redacted], Defendant	*	

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE - UNLAWFUL STOP AND ARREST

NOW COMES the Defendant, [redacted], by and through his counsel, and respectfully moves this Court to suppress all evidence obtained as a result of the unlawful stop and arrest of the Defendant by officers of the Claremont Police Department and other law enforcement officers on or about the late evening and early morning of January 12, 2006 and January 13, 2006.

IN SUPPORT OF THIS MOTION, the Defendant submits as follows:

1. The Defendant is charged, in a four count indictment, with possession of a firearm in furtherance of a drug trafficking crime contrary to 18 U.S.C. §924(c); unlawful user of a controlled substance in possession of a firearm contrary to 18 U.S.C. §922(g)(3); possession with intent to distribute heroin contrary to 21 U.S.C. §841(a) and possession of a stolen firearm contrary to 18 U.S.C. §922(j).

2. The indictment is the result of an undercover investigation led by Police Officer Jon F. Stone of the Claremont, New Hampshire Police Department.

3. Attached to this Motion is Officer Stone's Application for Search Warrant and

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Supporting Affidavit, Exhibit #1; and Officer Stone's Affidavit in Support of Probable Cause to Arrest, Exhibit #2. Also attached to this Motion is Officer Stone's narrative report of his investigation in this matter, Exhibit #3. The facts set forth in this Motion are derived from these documents. However, it should be noted that Officer Stone, some time prior to March 28, 2006, was terminated from the Claremont Police Department. The reasons for his termination as a police officer are unknown and have been reported in the press as being confidential. See Exhibit #4. Upon information and belief, at least one state court has ordered the disclosure of Officer Stone's personnel file pursuant to a protective order. However, undersigned counsel's efforts to learn the reason for and circumstances of Officer Stone's dismissal from the Claremont Police Department have not been fruitful. Undersigned counsel has discussed the matter with Assistant United States Attorney Donald Feith. Mr. Feith has indicated that he will address the matter with Sullivan County Attorney Marc Hathaway.

FACTS

4. Officer Stone, working with a confidential informant, identified only as 05-TX-013 ("TX") began an undercover drug investigation several weeks before the Defendant's arrest. See Exhibit #2, Paragraph 1. TX was seeking favorable consideration on pending criminal charges. On December 30, 2005, TX informed Stone and other officers that he had information regarding a juvenile, Schuyler C.., who he believed to be selling heroin in the Newport and Claremont area. However, TX indicated that he had never purchased drugs from her in the past. Two weeks prior to December 30, 2005, TX had a conversation with Schuyler C.., wherein Schuyler C.. advised that she would hook up TX with heroin. There is no indication that the Defendant, [redacted], took part in that conversation

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or was even present. See, Exhibits 1, 2 and 3.

5. According to the Affidavits and report of Officer Stone, other alleged heroin suppliers told TX that they obtained supply from Schuyler C.. The Affidavit and reports do not mention those suppliers making any reference to the Defendant, [redacted]. During the course of the investigation, Stone obtained one party consent and eavesdropped on a number of phone calls made by TX to Schuyler C.. See, Exhibits 1-3. The Defendant was not mentioned at all in any of said phone calls. See, Exhibits 1-3.

6. On December 30, 2005, Stone and TX engaged in a controlled purchase of heroin allegedly from Schuyler C.. The controlled purchase was allegedly recorded by audio recording device and surveilled by police officers, including Stone. The Defendant was not identified as being involved in said controlled purchase and sale of heroin, nor was his name even mentioned. See, Exhibits 1-3.

7. On January 12, 2006, Stone and TX again attempted to make a controlled purchase of heroin from Schuyler C.. They did so through the use of recorded telephone calls to Schuyler C.. in order to set up the controlled purchase and sale. At no time during said recorded telephone calls was the Defendant's name mentioned.

8. At some point after 11:00 p.m., Schuyler C.. met with TX and allegedly made a controlled sale of heroin to TX.

9. Officer Stone indicates in his Affidavits and report that Schuyler C.. arrived as a passenger in a red station wagon. The reports do not identify, nor was the identity of the driver of the station wagon, known to the police at the time of the controlled sale and purchase. Indeed, Officer Stone indicates that the identification of the driver was not made until later. See, Exhibit 2, Paragraph 33. The driver of the vehicle did not leave the vehicle

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and did not enter the residence where the controlled sale of heroin occurred. The controlled sale of heroin was audio recorded and the Affidavits and reports do not indicate that there was any mention of the Defendant, [redacted], during said controlled purchase. Likewise, the driver of the vehicle who was "later identified as [redacted]" was not observed to be committing any illegal activities while waiting in the red station wagon.

10. When Schuyler C. left the residence where the alleged controlled purchase was made, Officer Stone indicates that he "then advised Sgt. Andrewski and a motor vehicle stop was conducted on the vehicle".

11. The motor vehicle was not observed to violate any traffic laws.

12. The Defendant's warrantless arrest was not supported by probable cause and therefore all evidence seized as a result of the arrest including items found on his person and in his car must be suppressed.

LEGAL ARGUMENT

The Defendant's Arrest Was Not the Product of a Valid Traffic Stop or "Terry Stop."

13. As indicated by Officer Stone in each of his Affidavits and his Report, the Defendant was in handcuffs and placed into a cruiser for transport to the police station as Stone arrived. Stone's Affidavit in Support of the Application for a search warrant indicates that the Defendant was arrested for "conspiracy to sell controlled drug (sic)." There is no reference whatsoever to any traffic violation or other cause leading to the Defendant's arrest. Thus, the officers possessed no probable cause to believe that a traffic violation had occurred and the stop of the vehicle and seizure of the Defendant was not justifiable under

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United States v. Whren, 517 U.S. 806 (1996.)

14. Likewise, the stop and seizure of the Defendant cannot be characterized as a brief investigatory or "Terry" stop. *See, generally* , Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968.) A Terry stop is a brief encounter based upon a reasonable suspicion that a person has engaged in or is about to be engaged in criminal activity. *See, e.g.* United States v. Cook, 277 F.3d 82 (1st Cir., 2002); United States v. Taylor, 162 F. 2d 12 (1st Cir., 1998.) The seizure of the Defendant was neither brief nor of an investigatory nature. Indeed, the Defendant upon being stopped, was immediately handcuffed, placed in a police vehicle and removed from the scene. The Government cannot reasonably argue, under these facts, that the seizure of the Defendant was authorized as an investigatory or Terry type seizure.

**The Warrantless Arrest of the Defendant
Was Not Based on Probable Cause**

15. Every warrantless arrest, or seizure similar to an arrest, is unreasonable unless supported by probable cause. *See*, Michigan v. Summers, 452 U.S. 692, 700, 101 S.Ct. 2587, 2593, 69 L.Ed.2d 340 (1981). In determining whether probable cause existed the court must consider the "totality of the circumstances." Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The term "probable cause" means something less than evidence which "would justify condemnation or conviction." Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949) (citations omitted.) However, "common rumor or report, suspicion, or even 'strong reason to suspect'" do not establish probable cause. Henry v. United States, 361 U.S. 98,101, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). "The quantum of information which constitutes probable cause [is] evidence which

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would 'warrant a man of reasonable caution in the belief' that a felony has been committed." Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963) (citations omitted). In this case the Government does not meet the probable cause standard.

16. The arrest of the Defendant is based upon nothing more than the fact that the Defendant and Schuyler C. Were traveling in the same vehicle. The officers observed no illegal behavior by the Defendant and he neither entered the home nor participated in the alleged "controlled buy" which occurred inside the home. He had not previously been identified as a participant in drug sales and, indeed, it appears that the officers did not know his identity until some time after the arrest. *See*, Exhibit 2, ¶ 33. He had done nothing but sit peacefully in the vehicle.

17. It is elementary constitutional law that the Fourth Amendment "protects people, not places." *See,* Rakas v. Illinois, 439 U.S. 128, 138-143, 148-149, 99 S.Ct. 421, 427-430, 433, 58 L.Ed.2d 387; Katz v. United States, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511, 19 L.Ed.2d 576. Determinations of probable cause must be specific to the individual seized and must not be based upon a "person's mere propinquity to others independently suspected of criminal activity." Ybarra v. Illinois, 444 U.S. 85, 90, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979) *citing to* Sibron v. New York, 392 U.S. 40, 62-63. Probable cause is not something that can be transferred from one person to another:

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

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Ybarra, *id*. (Citations omitted.) The facts in Ybarra are similar to the case at bar. In Ybarra state authorities had established sufficient probable cause to obtain a search warrant for the Aurora Tap Tavern and the bartender, "Greg." The probable cause underlying the warrant was based upon the observations made by undercover officers of Greg's dealing of narcotics in the Aurora Tap Tavern. The observations of the undercover agents did not extend to any patrons of the tavern. Ybarra, 444 U.S. at p. 87 - 88. Upon execution of the search warrant, Ybarra, a patron of the tavern was frisked, searched and eventually arrested and charged with possession of narcotics. The Supreme Court held:

> Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.

Ybarra, id at 91 - 92. In this case the probable cause to arrest existed only for the actions of Schuyler C. The officers possessed no information which extended to the Defendant upon which to base probable cause to believe that a felony had been committed and that the Defendant had committed it. Therefore, his seizure and arrest violated the Fourth Amendment protection against unreasonable searches and seizures and all fruits of the arrest must be suppressed.

18. Ybarra, did not create new law. In United States v. DiRe, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), the Supreme Court considered similar facts. In DiRe the defendant was in an automobile with two other men one of whom was an

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informant. The informant had advised agents that he was to buy counterfeit ration coupons from Buttita, another passenger in the car. The agents approached the three men and found the informant to be in possession of two counterfeit ration coupons which he said had been obtained from Buttita. Buttita and DiRe were arrested. DiRe was eventually searched and found to be carrying 100 counterfeit coupons. The Court found that the facts did not suggest sufficient probable cause for the arrest and search of DiRe: "Presumptions of guilt are not lightly to be indulged from mere meetings." DiRe at p. 594. Similarly, the Defendant's mere presence in an automobile does not establish probable cause to believe that he committed the offense of conspiracy to sell controlled drugs where he did not participate in the sale and the officers had no evidence of his involvement in the planning or logistics of the alleged sale or even his identity.

19. In United States v. Barber, 557 F.2d 628 (1977) the Eighth Circuit Court of Appeals faced similar facts and relied on DiRe. In Barber a group of individuals drove to a liquor store. One individual entered the store and attempted to purchase liquor with a counterfeit hundred dollar bill. Fortuitously, a secret service agent was present in the store and immediately determined the counterfeit nature of the bill. The individual in the liquor store as well as the occupants of the waiting motor vehicle were all arrested and searched. The agents found eleven more counterfeit bills during the search of the waiting individuals. The Barber court found:

> The facts of this case disclose a similar absence of probable cause for the arrest of Keller. At the time the officers arrested Keller, they knew only that he had driven Barber to the liquor store, and was waiting in the car just outside the store as Barber was apprehended. The officers' presence at the store was fortuitous; they had not been tipped to await Barber's entry. Further, Barber said nothing during his arrest which would implicate

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> the occupants of the car as his confederates in crime. And, as in Di Re, there was nothing in Barber's observable conduct which conveyed any overt indication of criminality. The incident occurred during daylight at a store open for regular business. Had Barber been masked or carrying a weapon, a person in Keller's position, who could clearly observe his actions, could be charged with an awareness of their criminal nature. However, Barber simply entered the store, selected his purchase, and produced a bill from his wallet in payment thereof. If anything out of the ordinary was observable to the car's occupants, it was the stalling of the store proprietor and Barber's apprehension by the three off-duty law enforcement officers. The record is clear that Keller and his companions could observe all these developments, but made no attempt to flee, even after Barber was taken into the back room by the officers. The three were still seated in the car when detective Knestrict and agent Haldeman emerged from the store to arrest them.

Barber at p. 631. this case is quite similar. At the time that the station wagon was observed by the officers they knew only that the unidentified male had driven Schuyler C. to the residence. The Defendant simply waited in the vehicle. There was no overt action which revealed any criminality. The Defendant did not try to hide as he waited and he did not take any counter surveillance measures as he approached the residence or while waiting in the vehicle. He did not try to hide from passerbys or individuals who might see him on the street. He took no counter-surveillance measure as he drove away from the residence and, apparently, pulled over when signaled to do so by the police. In short there was simply no observable conduct to form probable cause that the Defendant was involved, in any way, with the alleged transaction occurring inside the residence. As in Barber, the officers did not establish probable cause to arrest the Defendant and therefore all fruits of that arrest must be suppresses because the arrest and seizure of the Defendant was unreasonable and violated the Fourth Amendment.

20. The Third Circuit has also recognized that mere presence at a given location does not establish probable cause. *See*, United States v. Butts, 704 F.2d 701 (1983). In

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Butts the defendant, Morgan, accompanied his two co-defendants, Butts and Passanante to a photographic studio. The co-defendants entered the studio to obtain photographic identification which would enable them to cash stolen checks. The defendant remained in the car. The vehicle was followed and pulled over by postal inspectors. The postal inspectors saw, apparently in plain view, a stolen check in the pocket of one of the co-defendants. The co-defendant admitted that the check did not belong to him and all of the occupants of the car, including the defendant, were then seized and transferred to the investigator's office for questioning. *Id*. at 702 - 703. In finding that probable cause to arrest the defendant had not been established the Third Circuit relied heavily on the following facts:

> In the instant case, at the time of the arrests all that the postal authorities knew about Morgan was that he had been sitting in the back seat of the car which Butts and Passanante approached. Morgan had not accompanied Butts and Passanante on their trip to the Studio. The arresting authorities had no reason to believe that Morgan knew about or was involved in the scheme involving the stolen checks. Morgan might have been sitting in the car simply because he had some unrelated and wholly lawful business with Butts or Passanante.

Butts at p. 703 - 704. Morgan's mere presence in the car was insufficient to establish probable cause to arrest him.

21. The Defendant's situation is analogous to the facts in Butts. He did nothing but drive to a place with Schuyler C.. and wait in the vehicle. He may have had an entirely unrelated business with Schuyler C.. The Government has no evidence to show otherwise.

CONCLUSION

22. The officers did not have probable cause to arrest the Defendant. Thus his

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arrest constituted an unreasonable seizure in violation of the Fourth Amendment. All evidence obtained as a result of the arrest including the search of the Defendant's vehicle and his person must be suppressed. The Government cannot justify its violation of the Fourth Amendment by relying upon the fact that the unlawful seizure yielded incriminating evidence. *See*, United States v. Diallo, 29 F. 3d 23, 26 (1994) citing to Maryland v. Gunnison, 480 U.S. 79, 85 (1987).

23. Because the granting of this motion would be dispositive in nature the assent of the Government was not sought.

24. The points and authorities set forth herein support the relief requested and a further legal memorandum is unnecessary.

WHEREFORE the Defendant moves this Court to grant the following relief:

A. Hold an evidentiary hearing on this motion; and,

B. GRANT this motion and suppress all evidence obtained as a result of the warrantless arrest of the defendant to include but not be limited to all items seized from his vehicle, all items seized from his person, and all items seized pursuant to search warrants which were based upon his seizure, arrest and search; and,

C. Grant such further relief as may be just.

Respectfully submitted,
[REDACTED], Defendant
By his Attorneys,
BRENNAN, CARON, LENEHAN & IACOPINO

Date: June 14, 2006

By: /s/ Michael J. Iacopino

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Certificate of Service

I hereby certify that a copy of the foregoing Motion was served on the following person, even date herewith, and in the manner specified herein: electronically served through ECF: Assistant United States Attorney Debra Walsh, United States Attorney's Office, James C. Cleveland Federal Bldg., 55 Pleasant St., Room 352, Concord, NH 03301-3941.

/s/ Michael J. Iacopino, Esq.
Michael J. Iacopino, Esq. (Bar No. 1233)