

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
)
)
v.) **Criminal No. 90-00001 P**
)
ELVIN BIENVENIDO PENA-CRUZ,)
)
Defendant)

RECOMMENDED DECISION ON MOTION TO SUPPRESS

On January 9, 1990 the Grand Jury charged the defendant in a two-count Indictment with falsely representing himself to be a citizen of the United States in violation 18 U.S.C. ' 911 and with making false statements and representations of material facts within the jurisdiction of the Immigration and Naturalization Service of the Department of Justice ("INS") in violation of 18 U.S.C. ' 1001. The defendant has filed a motion to suppress statements made by him to INS Special Agent John Remsen on December 19, 1989 which give rise to the present charges. An evidentiary hearing was held before me on March 13, 1990.¹ The last of the legal memoranda was filed on April 20, 1990. I

¹ At the outset of the hearing the defendant generally questioned my authority as a magistrate to conduct the hearing and recommend findings of fact and a disposition of the motion. In addition, he specifically he objected to the procedure employed by which a judge of this court will decide whether and to what extent to accept my recommended findings of fact where the judge himself has not had an opportunity to observe the demeanor of witnesses in order to make credibility determinations. 28 U.S.C. ' 636(b)(1)(B) specifically authorizes a judge to designate a magistrate to conduct evidentiary hearings and to submit proposed findings of fact and recommendations for the disposition of motions to suppress evidence in a criminal case. Local Rule 8(c) authorizes full-time magistrates to exercise all powers and perform all duties conferred on magistrates by 28 U.S.C. ' 636(b). I note, moreover, that in formulating my recommended findings of fact I have not had to resolve any testimonial conflicts.

recommend that the following findings of fact be adopted and that the motion to suppress be denied in part and granted in part.

I. Proposed Findings of Fact

At approximately 6:35 p.m. on December 19, 1989 a 6-foot 3-inches tall, 220-pound uniformed Maine State Trooper, Kevin Curran,² who was on routine patrol in a marked cruiser, stopped a vehicle proceeding north on the Maine Turnpike just south of Exit 8 because the rear registration plate was not illuminated as is required by Maine law. T. 6-8, 14-16. The vehicle came to rest about 100 yards south of the Exit 8 off ramp. T. 7-8. Although it was dark, the area was very well lit. T. 32. Trooper Curran approached the driver's side door of the vehicle and obtained from the driver his license and the vehicle registration. T. 8. After explaining to the driver the reason for the stop and as part of a standard operating procedure, the trooper then asked the other three occupants of the vehicle, one of whom was the defendant, for identification.³ T. 8-9, 19. None of them produced any. T. 9. The driver explained that they were on their way to a Bates Street, Lewiston address. T. 10. At that point the trooper returned to his cruiser where by radio call he requested the assistance of another trooper and also requested the barracks to ask INS to send someone to the scene.⁴ *Id.* Trooper Curran also initiated a license check on the driver as well as a registration and

² Trooper Curran carried on his person at the time a holstered 9 mm. Beretta service weapon and was holding a 20,000 candle power flashlight. T. 15, 32.

³ Although all four occupants appeared to be of Hispanic origin, Trooper Curran, who does not speak Spanish, communicated to them in English. T. 9-10, 26. They appeared to him to understand what he was saying. T. 9-10.

⁴ Trooper Curran testified that it was his experience that individuals who are stopped, as here, on a routine matter and who indicate they do not have identification usually do have identification and turn

wanted" check on the vehicle. T. 11. When two other troopers⁵ arrived, in separate cruisers, the three troopers participated in a patdown search of all four occupants for weapons to insure their own safety. T. 11, 19, 26-27. No weapons, contraband or drug paraphernalia were found, but some documents were recovered. T. 11-12, 25-26. They were not examined at that time, but instead were

out to be wanted. T. 20. He also stated that at least 50 times within the last year he had dealt with the apprehension of illegal aliens on the turnpike. T. 22. He further testified that the occupants of the stopped vehicle were not free to leave until INS arrived and that their detention was based on the following factors: (i) the failure of three of them to produce identification and their unwillingness to provide their names, social security numbers or dates of birth; (ii) the trooper's inability to determine their identities which, in combination with the first factor, led him to suspect, based on his experience, that the four were illegal aliens; (iii) the driver's indication that they were headed to a certain Lewiston, Maine address which was known to law enforcement officers as a drug trafficking location, which indication heightened the trooper's suspicion of illegal alien status; and (iv) the existence of a known problem involving the influx of illegal aliens into the Lewiston area. T. 21-25, 33-35. The trooper also testified that his suspicion that the four were illegal aliens was based in part on their Hispanic appearance and the fact that they were speaking a foreign language. T. 39-40.

⁵ These troopers were also tall, one being approximately 6-feet 5-inches to 6-feet 6-inches in height and the other approximately 6-feet 2-inches, and both were in uniform and carried similarly holstered service weapons. T. 30-31. One of these troopers had a drug dog in his cruiser which he had sniff the stopped vehicle. T. 31-32. However, the dog did not respond in a way which indicated that drugs were present. T. 31.

held until INS Agent Michael Buchanan arrived whereupon they were turned over to him. T. 12. In the meantime, Trooper Curran issued a defect card on the vehicle which effectively gave the driver 24 hours within which to correct the rear registration plate light defect without penalty. T. 18, 29.

While Trooper Curran waited in his cruiser for results of the checks to come back through the barracks,⁶ INS Agents Buchanan and Remsen arrived.⁷ T. 12. It was now approximately 7:10 p.m. T. 73. They were dressed in street clothes consisting of jeans, sweaters and winter coats. T. 66. They recognized Trooper Curran, having dealt with him before on the Turnpike. T. 44. Curran explained to them that the four male Hispanics had been stopped for a traffic violation, that only one had produced identification (an alien registration or "green" card) and that they were headed for 293 Bates Street in Lewiston.⁸ T. 44-45. The agents then attempted to obtain as much information as they could from each of the four stopped individuals, including their names and dates of birth, so they

⁶ The license check ultimately confirmed that the driver's license was valid. T. 17.

⁷ Although Trooper Curran had requested the barracks to contact INS, Agents Buchanan and Remsen had not received a request to investigate this matter. T. 43, 67. Rather, they came upon the scene while on their way to a meeting in Lewiston. T. 42-43. Agent Remsen testified that as they approached Exit 8 they saw several blue lights, a stopped vehicle with Massachusetts registration plates and four Hispanic-appearing males standing in the breakdown lane next to the stopped vehicle. T. 42. Because of the Massachusetts license plate and presence of Hispanic-appearing males heading in a northerly direction on the Maine Turnpike, they decided to stop and determine whether the troopers needed assistance. T. 44, 70. They initially stopped and parked their vehicle past the Exit 8 off ramp, walked back to the location of the stopped vehicle and identified themselves. T. 28, 44. Later they moved their car to a position in front of the stopped vehicle. T. 28. Approximately 10 minutes elapsed between Trooper Curran's request for INS assistance and the arrival of Agents Buchanan and Remsen. T. 13.

⁸ The INS agents were familiar with the Bates Street address as a result of having worked with the Lewiston Police Department in raiding that location on a number of occasions, at least one of which disclosed the presence there of aliens who were nationals of the Dominican Republic. T. 45, 47, 71-72. The INS is actively engaged in the war on drugs as it involves aliens. T. 73. In this connection Agent Remsen had come to learn that there has been an influx of Dominicans coming up the Maine Turnpike from Massachusetts and that many are illegal aliens and involved in drug trafficking. T. 73-74.

could conduct record checks in an effort to establish their citizenship. T. 45. The driver indicated he is a citizen of the Dominican Republic and produced his green card. T. 46. The other two non-defendants likewise asserted that they are Dominican nationals. T. 47. They also claimed to be amnesty applicants.⁹ *Id.* When Agent Remsen approached the defendant, identified himself as an INS agent and asked him his name, date of birth and citizenship,¹⁰ the defendant claimed to be Carmelo Sanchez Rodriguez, a Puerto Rican, and gave a 1967 date of birth. T. 48, 75. When Remsen asked the four where they were going, the driver responded by giving the Bates Street address and the name of an individual. T. 49. Remsen recognized the name as having come up during the INS' investigation of Dominican drug trafficking in the Lewiston area. *Id.*

⁹ An amnesty applicant is someone who has been illegally in the United States at some point prior to a specific date but has become eligible under the Immigration and Nationality Reform Act of 1986 to apply for legal alien status. T. 64.

¹⁰ All of Agent Remsen's conversations with the defendant were conducted in Spanish. T. 59. Agent Remsen is conversationally fluent in Spanish. T. 42.

Because the stop scene was less than one-half mile from INS headquarters in Portland and that facility contained computer equipment for performing immigration records checks to determine alien status,¹¹ the agents asked the driver to follow them to their office for that purpose.¹² T. 50. The agents led the way, the Massachusetts car containing all four detained individuals followed and a state police cruiser brought up the rear. T. 51. At no time while the four occupants were on the turnpike were they either placed in handcuffs or formally arrested. T. 14.

The small convoy arrived at INS headquarters at approximately 8:00 p.m. T. 83-84. The four detainees were accompanied into the building by the two INS agents and a state police officer. T. 82. The initial questioning of the defendant took place in an interior open area of the one-story building referred to as the Investigation and Enforcement Section. T. 51, 82-83. All four individuals were allowed to remain in that area, outside of individual offices. T. 52. They were not handcuffed. *Id.* Each was asked again for his name and birthdate. *Id.* Using this information, Agent Remsen

¹¹ The computer equipment accessed the INS' nationwide searching system which contains the names of all aliens having a legal right to be in this country. T. 52.

¹² Agent Remsen testified that had the defendant then started to walk away he would have stopped him and questioned him further because he was not satisfied that the defendant was who he said he was. T. 77-78. Likewise, had the four individuals attempted to drive away, Agent Remsen would have stopped their car. T. 80. Trooper Curran testified that the INS agents "` had [the occupants of the car] follow them to their facility." T. 13.

conducted computer records checks on all of them. *Id.* The driver's information checked out, including his green card status.¹³ T. 53. The other two were verified as having amnesty applicant status, were fingerprinted and photographed and were ultimately released. T. 54.

¹³ Because it was determined in the checking process that he was wanted in Boston on a narcotics charge, he was released from INS custody into local police custody for transfer the next day to Boston law enforcement officials. T. 53.

Agent Remsen finally focused on the defendant. When he again asked the defendant for his name, date of birth and country of citizenship, the defendant gave the same name he had recited to Agent Remsen on the Turnpike. T. 55. Agent Remsen then advised the defendant it was a violation of law to tell an immigration officer he was a citizen of the United States if in fact he was not. *Id.* He testified that he rendered this advice based on his experience over time with Dominican nationals who have made false claims of United States citizenship. *Id.* He suspected the defendant was not Puerto Rican based on the fact the other three were Dominican nationals and they were all headed for 293 Bates Street in Lewiston. *Id.* The agents then asked to fingerprint the defendant but he initially balked and inquired why it was necessary. T. 56, 85-86. When they explained to him it was a procedural identification and Agent Remsen repeated his admonition that it was a violation of law to make a false claim of citizenship, the defendant permitted himself to be fingerprinted.¹⁴ T. 56-57. The defendant's reluctance, however, again raised Agent Remsen's suspicions as he pondered why a citizen would be afraid to be fingerprinted.¹⁵ T. 56. During the fingerprinting Agent Remsen again asked the defendant his name and country of citizenship. T. 89. He responded as he had on the two prior occasions. *Id.* After the defendant was fingerprinted, Agent Remsen asked him if a yellow Puerto Rican birth certificate, one of the documents the agents had received from the state troopers, was his. T. 57. He acknowledged it was. *Id.* The certificate was issued to one Guillermo Rafael Sanchez

¹⁴ Agent Remsen testified that the defendant "submitted to being fingerprinted, and we fingerprinted him." T. 57. There is a separate room at INS headquarters for fingerprinting. T. 51.

¹⁵ Remsen described the defendant's reaction as "pretty strange" based on some 12 years experience fingerprinting people. T. 87.

Figuroa. Gov't Exh. 1. The subject's birthdate was listed as April 29, 1967 and his father's name was listed as Carmelo Sanchez Rodriguez, the same name now given three times by the defendant as his own. *Id.*, T. 48, 55.

Agent Remsen testified that at this point and for the first time his suspicions solidified into a belief that the defendant was guilty of some criminal violation.¹⁶ T. 59-60. It was now 8:30 p.m. T. 83. Remsen took the defendant into his office, read him the *Miranda* warnings from a Spanish-language INS form, asked him if he could read and then gave him the form to read. T. 60, 62. After the defendant read the form, Agent Remsen asked him if he understood it and if he was willing to answer questions and, if so, to sign it. T. 62. The defendant orally acknowledged he understood his rights and signed the form in Remsen's presence at 8:35 p.m. using the name "Carmelo Sanchez R." T. 61-62, 83. Remsen then asked the defendant questions about matters which would be within the common knowledge of a Puerto Rican. T. 62. Some of the defendant's answers were correct and others were not. *Id.* Then, for the third time, Remsen told the defendant it was a violation for him to claim to be a United States citizen if he was not. T. 63. Remsen also explained to the defendant the distinction between one's self and one's father, since the defendant appeared to be using his father's name. *Id.* The defendant persisted in his claim that he is a Puerto Rican. *Id.* Shortly thereafter the defendant volunteered that he is a Dominican and that his name is Elvin Bienvenido Cruz. *Id.* He gave his date of birth as November 28, 1962 and claimed he is an amnesty applicant. *Id.* The defendant was then refingerprinted, this time on a card bearing his correct name. T. 64. A records check under the defendant's true name turned up no record in the INS computer. *Id.* The defendant

¹⁶ Remsen explained that, while until this moment he did not believe the defendant was who he said he was, he had only *suspected* him of criminal conduct. T. 60, 90. He testified that he first came to believe the defendant had committed the crime of making a false claim of citizenship when he presented the birth certificate as his own and Remsen actually examined it. T. *Id.*, 95.

then called a female in Dorchester, Massachusetts who supplied the INS agents with an eight-digit number which, after much checking, was determined the next day to be a registration number for the Replacement Agricultural Worker System, a lottery. T. 65-66. Once the defendant claimed to be an illegal alien and no INS record for him was found, he was arrested. T. 66. The arrest took place more than two hours after the initial stop and detention. T. 6, 83.

II. Legal Discussion

The defendant makes the following arguments in support of his motion to suppress: (1) the state police and the INS agents lacked reasonable suspicion to detain him; (2) the government lacked probable cause to arrest him; and (3) the government subjected him to a custodial interrogation without the benefit of *Miranda* warnings. In analyzing these arguments, I have segregated the statements the defendant seeks to suppress into two categories: (1) those made alongside the Maine Turnpike and (2) those made at INS headquarters.

A. Statements Made Alongside the Maine Turnpike

I first examine whether the statements made by the side of the turnpike should be suppressed. In so doing I have divided my analysis into the following steps: (1) whether Trooper Curran had sufficient reason to stop the vehicle in which the defendant was a passenger; (2) whether the defendant's detention pending the arrival of the INS agents was based on a reasonable suspicion of criminal activity and, if so, (3) whether his detention and subsequent questioning while still alongside the turnpike were reasonable means of confirming or dispelling such suspicion.

The unilluminated taillight clearly provided Trooper Curran with justification for stopping the car. *See* 29 M.R.S.A. ' ' 1366, 2501, 2502(1)(F). In fact, the initial stop was nothing more than a routine traffic stop for which a defect card was eventually issued. T. 18, 29. The trooper's subsequent request for identification from the passengers was standard operating procedure during such a traffic stop. T. 19.

Such a request for identification is permissible under the Fourth Amendment. The Supreme Court has stated that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *INS v. Delgado*, 466 U.S. 210, 216 (1984). But even when a person who is not detained is lawfully approached by a law enforcement officer for questioning, he "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 497-98 (1983). If the person refuses to answer "[h]e may not be detained even momentarily without reasonable objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Id. See also Brown v. Texas*, 443 U.S. 47, 52 (1979) (police officer's detention of defendant for refusing to produce identification where none of circumstances preceding officer's detention

justified a reasonable suspicion that defendant was involved in criminal conduct violated Fourth Amendment).

Thus, although the initial stop of the vehicle in which the defendant was riding as a passenger was justified and the ensuing request for identification directed to all four occupants, including the defendant, was permissible, the defendant's failure to produce any identification, without more, could not furnish grounds for detaining him. The question before the court, therefore, is whether any of the circumstances preceding Trooper Curran's detention of the defendant justified a reasonable suspicion that he was involved in criminal conduct and, if so, whether the scope of the detention was within the limits of an investigative seizure as circumscribed by *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny.

In *Terry* the Supreme Court recognized that the Fourth Amendment does not prohibit some degree of intrusiveness, short of full-scale arrest, in police-citizen encounters which are based on less than probable cause if the intrusion is proportional to the law enforcement officer's reasonable suspicion of criminal activity. *Id.* at 25-27. The suspicion "` cannot be inchoate, but must be based on `specific and articulable facts . . . together with rational inferences from those facts. . . ." *United States v. Trullo*, 809 F.2d 108, 110-111 (1st Cir.), *cert. denied*, 482 U.S. 916 (1987) (quoting *Terry*, 392 U.S. at 21). In determining the reasonableness of a *Terry* stop the court must view "` the totality of the circumstances confronting the officer." *Trullo*, 809 F.2d at 111. *See also United States v. Cortez*, 449 U.S. 411, 417 (1981) (based upon totality of the circumstances, "` the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity"). In the context of stopping a vehicle suspected of containing illegal aliens, the Supreme Court has stated that "` [o]f critical importance, the officers knew that the area [where the car was stopped] was a crossing point for illegal aliens." *Id.* at 419. The Court has also stated, however, that the Hispanic

appearance of the occupants of a car may not furnish the *only* basis for suspecting the occupants of being illegal aliens. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975).

In this case Trooper Curran testified that his decision to detain the occupants of the stopped vehicle because of his suspicion that they were illegal aliens was based on other factors besides their failure to produce identification and their Hispanic appearance. The totality of the circumstances facing Trooper Curran -- the fact that the occupants of the car were headed to a known drug trafficking location, the influx of illegal aliens to the Lewiston area, the trooper's experience in apprehending illegal aliens on the Maine Turnpike, together with the occupants' Hispanic appearance, conversation in a foreign language and lack of identification -- furnished him with a reasonable suspicion that the defendant was an illegal alien. Trooper Curran's decision to detain the occupants of the car until the arrival of the INS was, therefore, a reasonable means of dispelling or confirming his suspicions quickly. *United States v. Sharpe*, 470 U.S. 675, 686 (1985). As such, the initial decision to detain the defendant until the arrival of INS agents did not violate the Fourth Amendment.¹⁷

I further determine that the questioning by the INS agents at the side of the Turnpike was within the limits of *Terry*. These agents had been informed by Trooper Curran of the circumstances of the stop, the Lewiston address to which the occupants of the car were headed and the fact that only the driver had produced identification. T. 44-45. Moreover, they had been involved in at least one raid at the same address which disclosed the presence of aliens of Dominican nationality. T. 45, 47, 71-72. In addition, Agent Remsen was aware that there has been an influx of Dominicans coming up

¹⁷ The defendant argues that, after the patdown search revealed he was unarmed and carrying no drug contraband, there was no longer any reasonable suspicion to detain him. The purpose of the patdown was to insure the troopers' safety. The nonpresence of drugs or weapons on the person of any of the four occupants of the car does not compel the conclusion that the articulated basis for Trooper Curran's suspicion concerning the defendant's alien status was no longer reasonable.

the Maine Turnpike from Massachusetts and that many are illegal aliens and involved in drug trafficking. T. 73-74. Finally, Agent Remsen's questioning of the three other occupants, which revealed that they were Dominican nationals claiming amnesty status, two of whom were without the requisite identification, T. 47, 70, provided an additional reason to suspect that the defendant was an illegal alien.¹⁸

¹⁸ *See also* 8 U.S.C. ' 1304(e) which provides:

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section.

The defendant also argues that he was "in custody" for practical purposes once he exited the car upon police order and was confronted by Trooper Curran, a large imposing figure who was holding a 20,000 candle-power flashlight and was armed with a Beretta 9 mm. hand gun. T. 14-15, 32. Other factors distinguishing the situation from an investigative stop, according to the defendant, were the presence of two other marked police cruisers, two other large and armed state troopers and a drug dog, and the fact that it was nighttime, dark and these events were taking place at the side of the Maine Turnpike.¹⁹ T. 30-32. Because the defendant was in a custodial situation, the defendant argues, he was entitled to receive *Miranda* warnings before he was interrogated in any respect by the INS agents.

The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A custodial situation arises only where "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Here, there was no formal arrest. The issue, then, is whether the defendant's freedom of movement was restrained to a degree associated with a formal arrest. Because the test is objective, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); see also *United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987). The Court of

¹⁹ The defendant's characterization of the scene is somewhat overstated. As indicated earlier, the troopers' weapons were holstered and the area of the stop, just short of a turnpike exit ramp, was well lit.

Appeals for the First Circuit has held that, although no mechanical test exists, the factors to be considered in determining this issue include: "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *Masse*, 816 F.2d at 809 (quoting *United States v. Streifel*, 781 F.2d 953, 961 n.13 (1st Cir. 1986)).

In *United States v. Quinn*, 815 F.2d 153 (1st Cir. 1987), the First Circuit held that the defendants were not in custody when their car was blocked by a Maine State Police patrol car in the driveway where it was parked in spite of the fact that there were as many as five policemen and a police dog at the scene, the defendants' identification was not returned to them, they were kept apart while being questioned and their interrogation did not take place in a public place but rather in a remote cottage late at night. In determining that the blocking of the appellant's car did not indicate "arrest-like restraint" the court found significant that all of the cars already in the driveway were parked one behind the other and that therefore the only reasonable inference was that "this mode of parking was a normal incident of the layout of the driveway and premises, signalling no special 'custodial' designs by the owner of the rearmost car." *Id.* at 156-57. Clearly the questioning by the side of the Maine Turnpike was no more custodial than that which took place in *Quinn*. I conclude, therefore, that the statements made by the defendant during his questioning by the side of the Maine Turnpike are all admissible in evidence.

B. Statements Made at INS Headquarters

I next address whether the transportation of the defendant to INS headquarters exceeded the limits of a *Terry* stop. The limits of a *Terry* stop may be exceeded if the action taken by the police is more intrusive than necessary to verify or dispel the officer's suspicion in a short period of time, *Royer*,

460 U.S. at 500, or if the defendant is restrained to such a degree that for practical purposes he is under arrest, *id.* at 503. The government claims that the INS agents' decision to proceed to the nearby INS headquarters was a reasonable means of dispelling or confirming their suspicions "in a swiftly developing situation," *see Sharpe*, 470 U.S. at 686, and that in such a situation there should be no unrealistic second-guessing, *id.* There is no explanation, however, of why this should be deemed "a swiftly developing situation." In *Sharpe* the Court stated that the 20-minute detention of the defendant while law enforcement officers secured and questioned another suspect was a reasonable means of confirming or dispelling the officers' suspicions quickly and that the delay was attributable almost entirely to the evasive actions of the defendant. *Id.* at 687-88. In comparison, the record reflects no exigent circumstances here which required the INS agents to bring the defendant to INS headquarters.²⁰ Unlike the 20-minute detention in *Sharpe*, the detention period here, measured from the time of the initial stop to the time of formal arrest, exceeded two hours. T. 6, 83.

This case is further distinguishable from *Sharpe* in terms of the events which occurred during the period of detention. The Court in *Sharpe* distinguished the facts of that case from those of *Dunaway v. New York*, 442 U.S. 200 (1979), in which the police picked up a murder suspect at a neighbor's home and brought him to the police station where, after being interrogated for an hour, he confessed. The *Sharpe* court found that it was not the length of the detention in *Dunaway* but the events occurring during the suspect's detention which transformed the *Terry* stop into a de facto arrest.

²⁰ The government has offered no explanation as to why it could not have conducted an alien records check through the INS computer system without transporting the occupants of the car to INS' Portland headquarters or why Agent Remsen could not have asked the defendant about the birth certificate during his interview with him by the side of the road.

Similarly, the *Sharpe* court distinguished *Royer* as focusing primarily on the fact that the police confined the defendant to a small airport room for questioning.

The circumstances under which the defendant was questioned at INS headquarters indicate that as a practical matter he was under arrest. In *Royer* the Court held that, although it was permissible for narcotics police to ask for and examine the defendant's airline ticket and his driver's license, when the police identified themselves as narcotics agents, told the defendant that he was suspected of transporting narcotics and asked him to accompany them to the police room at the airport without indicating in any way that he was free to depart, and at the same time retained his ticket and driver's license as well as his luggage, and when the defendant was placed in a small room alone with two police officers who again confronted him with their suspicions, he was, "as a practical matter," under arrest. *Royer*, 560 U.S. at 503. In this case the defendant, who had been transported to INS headquarters and escorted inside by three armed law enforcement officers, clearly was never told that he was free to leave and was, in fact, detained, questioned and fingerprinted at the facility.²¹ T. 52, 57, 82, 95. These

²¹ The government alternatively argues that the defendant's statements made at INS headquarters before his arrest were not made in a custodial situation because he was voluntarily transported to the INS headquarters. The record before the court does not support such a claim. The defendant clearly was already detained when the INS agents "suggested" to the driver that he follow them to the INS headquarters. The fact that he was not free to leave was made even more apparent when the INS car was moved from alongside the highway to the exit ramp in front of the car in which the defendant was a passenger. Although Agent Remsen's testimony that the defendant would have been stopped if he decided not to go to INS headquarters would be of minimal importance if such intent were unarticulated, see *Berkemer*, 468 U.S. at 442, the agent's intent to continue the detention of the occupants of the car was articulated by the blocking of their car. The fact that the car was escorted by the INS car in front and a state police cruiser behind and that the defendant was never told that he was free to go or that he was not under arrest further belies a claim that the defendant was voluntarily transported to INS headquarters. See *Royer*, 460 U.S. at 503 (defendant never told he was free to go before accompanying officers to room in airport for further questioning and before consenting to search of his luggage); cf. *Beheler*, 463 U.S. at 1122 (defendant voluntarily agreed to accompany police to station house and was specifically told he was not under arrest). Moreover, another observer,

factors indicate that the defendant, like the defendant in *Royer*, was, "as a practical matter," under arrest.²² I find, therefore, that the defendant's detention at INS headquarters was more intrusive than necessary to verify or dispel the officer's suspicion and that during his questioning there the defendant was restrained to such a degree that for practical purposes he was under arrest. Accordingly, I conclude that the government's detention and questioning of the defendant at INS headquarters exceeded the limits of a *Terry* stop.

The effect of such a finding is that, unless probable cause existed when the investigative seizure was transformed into an arrest, the statements made subsequent to and as a result of the arrest must be suppressed. *Royer*, 460 U.S. at 507. In analyzing the standard for determining the existence of probable cause, the First Circuit has stated that:

Probable cause exists when "the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense." *United States v. Figueroa*, 818 F.2d 1020, 1023 (1st Cir. 1987) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). In other words,

Trooper Curran, understood that the INS agents "had [the occupants of the car] follow them to their facility." T.13. I conclude, therefore, that the defendant was not voluntarily transported to INS headquarters.

²² The facts of this case are similar to those in *United States v. Crews*, 445 U.S. 463, 466-69 (1980), in which the defendant was apprehended in a public park and taken to the park police headquarters where he was questioned, photographed and then released after about an hour. The trial court's finding that the defendant's detention at the headquarters constituted an illegal arrest was upheld by the Court of Appeals and was unchallenged before the Supreme Court.

we consider the totality of the circumstances in evaluating whether the government demonstrated a sufficient "[p]robability . . . of criminal activity," *id.* at 1023-24 (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). "[P]robability is the touchstone. . . . [T]he government need not show the quantum of proof necessary to convict." *Id.* at 1023 (quoting *United States v. Miller*, 589 F.2d 1117, 1128 (1st Cir. 1978)).

United States v. Jorge, 865 F.2d 6, 9 (1st Cir. 1989).

In this case, until the defendant claimed ownership of the birth certificate after he was fingerprinted, all that Agent Remsen had was a reasonable suspicion, based on the factors stated above, that the defendant was not, in spite of his claim to the contrary, a native Puerto Rican and thus a citizen of the United States.²³ Thus, the government did not have probable cause to arrest the defendant when he was brought to INS headquarters for questioning. Because the defendant's incriminating statements and confession were made subsequent to and as a result of his illegal arrest, such statements must be suppressed. *See United States v. Crews*, 445 U.S. 463, 470 (1980) ("the exclusionary sanction applies to any 'fruits' of a constitutional violation -- whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or *confessions or statements of the accused obtained during an illegal arrest and detention*") (emphasis added); *see also Dunaway v. New York*, 442 U.S. at 216-19 (where defendant was seized without probable cause in order to probe for evidence and he confessed without any intervening event of significance, the Fourth Amendment required the exclusion of his confession even though it was

²³ Agent Remsen stated that he suspected that the defendant had made a false claim of citizenship prior in time to when he confronted the defendant with the certificate but that he "didn't believe the crime had been committed until he told me this was his birth certificate." T. 90. Although the fact Remsen did not believe there was probable cause does not foreclose the government from justifying the defendant's custody by proving probable cause, *Royer*, 460 U.S. at 507, the government does not argue that probable cause existed when the defendant was transported to INS headquarters and, in fact, asserts that the defendant's confession, rather than his claim of ownership of the birth certificate, furnished it with probable cause for his subsequent arrest. *See* Government's Supplemental Memorandum at 10.

made after receiving *Miranda* warnings). In this case the defendant's statements were a direct result of his illegal detention and questioning at INS headquarters. I conclude, therefore, that all statements made by the defendant at INS headquarters must be suppressed.²⁴

Accordingly, I recommend that the defendant's motion be **DENIED** as to his statements made alongside the Maine Turnpike and **GRANTED** as to his statements made at INS headquarters.

NOTICE

A party may file objections to those specified portions of a magistrate'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, within ten (10) days after being served with a copy thereof. A responsive memorandum 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 at Portland, Maine this 18th day of May, 1990.

²⁴ *Oregon v. Elstad*, 470 U.S. 298 (1985), cited by the government in support of its claim that the defendant's statements made after he was given *Miranda* warnings are admissible, is inapposite. *Elstad* did not involve an illegal arrest in violation of the Fourth Amendment but rather a violation of the defendant's Fifth Amendment right against self incrimination. The Court in *Elstad* declined to extend the "fruit of the poisonous tree" doctrine to a procedural *Miranda* violation. *Id.* at 306-09. This case, on the other hand, involves an illegal seizure under the Fourth Amendment which is not "cured" by later *Miranda* warnings unless the government demonstrates a break in the causal chain between the illegal arrest and the subsequent confession. *Dunaway*, 442 U.S. at 218.

David M. Cohen
United States Magistrate