

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-61-P-H
)	
MICHAEL FIASCONARO,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Michael Fiasconaro, charged with one count of knowingly and intentionally conspiring with others to possess cocaine with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1) and 846, Indictment (Docket No. 10) at 1, seeks to suppress a statement to the effect that he was the owner of a certain Honda as well as the following tangible items: (i) \$881 in United States currency, (ii) \$1,100 in United States currency taken from his person, (iii) \$9,000 in United States currency taken from the floor beneath the Honda’s front passenger seat and (iv) a cellular telephone that was connected to the Honda’s cigarette lighter, Defendant Michael Fiasconaro’s Motion To Suppress Evidence Pursuant to the Exclusionary Rule (“Motion To Suppress”) (Docket No. 12) at 1. An evidentiary hearing was held before me on November 9, 2001 at which the defendant appeared with counsel. I now recommend that the following findings of fact be adopted and that the Motion To Suppress be denied.

I. Proposed Findings of Fact

In late March 2001 Maine Drug Enforcement Agency (“MDEA”) agent William Deetjen debriefed an individual, dubbed “Confidential Informant 2182” (the “CI”), who had agreed to cooperate with federal agents following his arrest on drug-related charges in January 2001. The CI,

who had been charged with health-care fraud, acquisition of drugs by deception and conspiracy to possess a controlled substance (Oxycontin) with intent to distribute it,¹ told Deetjen that one Murray Spaulding, also known as “Beve” or “Beaver,” was trafficking in cocaine in Lyman, Maine. The CI informed Deetjen that Spaulding’s source was in Massachusetts and that Spaulding was making weekly trips down to pick up quarter-pounds of cocaine using various drivers. The CI had known Spaulding for years but had lost touch with him until the CI recently had accompanied the CI’s sister to Spaulding’s home so that the sister could purchase cocaine. At that time, Spaulding had told the CI he could “come back anytime.”

Deetjen, acting in a capacity as case manager for the Spaulding case, arranged for the CI to make a series of controlled purchases of cocaine from Spaulding. In each instance, the same protocol was followed: Deetjen met the CI at MDEA’s field office in Lyman, Maine; the CI placed a telephone call to Spaulding that Deetjen monitored and recorded; Deetjen searched the CI’s person and automobile for drugs, money or other contraband, finding none; Deetjen provided the CI with cash for the drug buy and planted a wire transmitter on him; the CI traveled in his own car to Spaulding’s home at 4 Galaxy Lane in Lyman, with Deetjen following in a separate vehicle and stopping at a distance from which he could observe the CI entering and exiting; the CI entered Spaulding’s home; Deetjen listened to the transmissions from the CI’s wire, in all but one case also recording those transmissions; the CI departed Spaulding’s home and met Deetjen at a prearranged rendezvous spot; the CI described, in his own words, the events that had just transpired; and Deetjen took control of the cocaine that the CI had just purchased from Spaulding.

These controlled purchases took place on April 5, 2001, when the CI bought 5.3 grams of cocaine for \$250, April 12, 2001, when the CI bought an “eightball” (an eighth of an ounce of cocaine)

¹ Prior to being debriefed by Deetjen, the CI had signed agreements with the government to plead guilty and to cooperate, with no (continued...)

for \$250, June 6, 2001, when the CI bought an ounce of cocaine for \$1,000, and June 20, 2001, when the CI bought an “eightball” for \$180.² On these occasions, Deetjen overheard conversation that included the following:

1. On April 5th, the CI telling Spaulding he would want the same amount on a weekly basis, and Spaulding responding that that would be no problem.

2. On April 12th, Spaulding advising the CI that inasmuch he “didn’t have much left – first come, first served,” the CI should come right over; the CI and Spaulding discussing the possibility of an “ounce buy”; and the CI offering to provide transportation. As part of this latter discussion, the CI asked Spaulding if he went to Massachusetts; Spaulding replied that he did and that it was a three-hour round-trip. He agreed to call the CI for the next trip.³

3. On June 6th, the CI lamenting that Spaulding had not gotten in touch with him and Spaulding responding that “when he had to go, he had to go”; and Spaulding telling the CI that his cost for a “half-key” (which Deetjen understood to mean a half-kilo of cocaine) was \$10,000, that he could provide it to the CI for \$13,000 and that during his best week he earned \$8,000 in profit.

In the course of working with the CI, Deetjen formed the opinion that he was very reliable inasmuch as information he had provided was corroborated by controlled buys, wire transmissions and recorded phone conversations. In fact, Deetjen considered the CI, who always showed up, was on time and was self-motivated, to be the best cooperating confidential informant with whom he had

promise of sentencing leniency. As of the time of the instant hearing the CI had pleaded guilty but had not yet been sentenced.

² On June 20th Deetjen forgot to turn the recorder on while the CI was in Spaulding’s home. After Deetjen discovered this error, he had the CI place a recorded phone call to Spaulding to “resurrect” the transaction and confirm that it had been made. One other deviation from what I have described as the standard protocol deserves note: another drug- enforcement agent, Jay Stoothoff, worked with Deetjen and the CI on the June 6th controlled buy.

³ It is not clear whether Deetjen directly overheard this conversation or whether the CI reported it. Deetjen testified that the CI’s description of the meeting was “consistent” with what he had overheard; however, no transcript of the April 12th conversation was offered in evidence.

worked in his twelve years at MDEA. Information provided by the CI eventually led to the arrest of five to six individuals apart from those involved in the Spaulding case, all of whom pleaded guilty.

In the weeks since Deetjen had debriefed the CI, he had periodically been in touch with Todd F. Prough, a United States Drug Enforcement Agency (“DEA”) agent assigned to the Cross-Border Initiative (“CBI”), a Massachusetts-based task force of local and federal drug-enforcement agents formed to combat drug trafficking in the northern New England states. Deetjen had told Prough from the beginning that MDEA had uncovered a seemingly substantial source of cocaine in Maine and that it looked as though the supplier was in Massachusetts. Each time there was a buy, Deetjen called Prough to fill him in, although not providing “all the details.” Deetjen could not recall whether he had filled Prough in on the CI’s background, although he “probably” had told Prough the CI was involved in an Oxycontin case. Prough did not recall whether he was familiar with the CI’s history, although he acknowledged that “it would have been a factor” in a probable cause decision to know that the CI had been charged with fraud.

Friday, June 22, 2001 proved to be a watershed day in the Spaulding surveillance operation. That day a series of phone calls were placed from or to the Lyman MDEA office, including:

1. An initial call in which the CI asked Spaulding, “Hey, did you say I could come down for them three (3) ‘Z’s’ now?” and Spaulding responded, “No, probably around five o’clock (5:00).”

Gov’t Exh. 1T at 1.

2. A second call in which the CI asked Spaulding, “Hey, am I taking you today?” and Spaulding replied, “I’m not sure if I’m even going bub.” *Id.* at 2-3. However, Spaulding agreed to leave a message for the CI if he needed a ride. *Id.* at 3.

3. A third call from the CI to Spaulding returning Spaulding’s call (per a message relayed to the MDEA office by the CI’s mother). Spaulding’s girlfriend, Tracey Smith, answered, telling the

CI that Spaulding would be right back and, “He said if you called and you needed to come over; come on over.” *Id.* at 4. In response to the question, “Are we taking a ride?” she responded, “Nope. I don’t think so.” The CI pressed the issue, saying, “I just was waiting for the ride. I didn’t know if he wanted me to take him or not.” *Id.* Smith replied, “Oh no. Not as I, not as far as I know. I don’t know.” *Id.*

Deetjen searched the CI and fitted him with a body wire – although he provided no money inasmuch as he hoped the CI would be making a trip with Spaulding. He followed the CI to Spaulding’s house and listened to and recorded the following conversation between Spaulding and the CI:

CI: I just drove to fucking Portland, right. Now don’t even get the stuff out because I’m gonna have to wait. Fucking I just went all the way He wanted three ounces (3 oz.).

MS: Got them right here.

CI: I know but Jesus you, you told me five (5), I told him five (5) I go up there, his boats [sic] gone. He’s got a camp on Sebago. I don’t fucking now [sic]. I’m gonna have to go try to find the fucker. Hell it’s worth it for me but Jesus Christ.

CI: How long you gonna have three (3), you gonna have three (3) for a while?

MS: I’ll tell ya I’d three (3), I got three (3) left. I was gonna give em’ to ya.

CI: Yeah. Fuck see I’m

MS: I’m ready to go too? I need to dump these to go. My guys’ [sic] waiting for me to come down right now.

CI: Fuck. Fuck, fuck. Well, I’m gonna try to call em’. I got to cause I didn’t want to talk on the phone you know?

MS: Hmm.

CI: Ayuh. I know. I know “Beve.” I call, I called, that’s why I called you this morning you know? Fuck. Cocksucker. I could make three hundred bucks (\$300.00) unintelligible.

MS: I'm ready to go too; there's another two-hundred (200) right there.

CI: Ayuh.

MS: You can't unintelligible, I gotta go. We're gonna go. We gotta go.

CI: Regardless?

MS: I gotta go.

CI: Can you, can we go . . . Do you have to get rid of that to go? Or can we just go anyways?

MS: I can go anyways.

Gov't Exh. 2T at 6-7. The CI stated that he would return in half an hour after he changed clothes, with Spaulding commenting, "Well I'm ready to go. You're gonna, hurry up and get back here." *Id.* at 8. To Deetjen, "my guy" meant Spaulding's source of cocaine, and "Do you have to get rid of that to go?" referred to whether Spaulding needed to get rid of the three ounces he then possessed to make the trip.

Deetjen followed the CI back to the MDEA office, where the CI stated that he and Spaulding were going to make a trip to Massachusetts to buy cocaine. Deetjen did not recall having overheard from body-wire transmissions that Spaulding had used the words "Massachusetts" or "cocaine." However, Deetjen testified that portions of the conversation were unintelligible and, in any event, drug traffickers are not usually overheard to utter such explicit terms during drug surveillance.⁴

Deetjen called Prough to notify him that the CI had just met with Spaulding and it looked as though they would be taking a trip to Massachusetts. He asked Prough to pick up surveillance in that state, and Prough agreed. Deetjen's "hope and expectation" – he equated the two words – was that

⁴ Deetjen acknowledged that, in cases in which a confidential informant has been charged with dishonesty or fraud, special precautions should be taken to corroborate information deriving from such a source; however, he did not question the CI's credibility in indicating that Spaulding had mentioned those words.

Spaulding would meet with his cocaine supplier and that both Spaulding and the supplier would be arrested. However, any decision to arrest a purported supplier was left to Prough.

Prough recalled Deetjen as having told him that the CI imminently was going to travel to Massachusetts with Spaulding to pick up a quantity of cocaine; that the CI would be driving his own vehicle with Spaulding as passenger; and that Spaulding was going to pay for a quantity of cocaine given previously on consignment. Prough was not aware whether Deetjen had himself overheard this information or whether it came from the CI or, if the latter, whether it was exaggerated or false.⁵

Deetjen's supervisor, Ken Pike, held a briefing in which, among other things, he assigned MDEA agent Gerard Lee Hamilton, Jr. to maintain surveillance of the CI's vehicle and monitor conversation within that vehicle. Hamilton installed a transmitter device in the CI's vehicle, and searched the CI and his vehicle. The CI was not instructed on the use of any specific visual or audible signal (such as removing one's hat), which drug-enforcement agents use both for the protection of confidential informants and as indicators that something important has happened.

The CI drove his red Nissan to the Spaulding residence, with Hamilton following. At about 5:10 p.m. the CI, driving his Nissan, departed Spaulding's residence with Spaulding as a front-seat passenger. Hamilton initially was unable to hear any transmission from the Nissan. When the CI stopped at the Kennebunk rest stop off of Interstate 95 and Spaulding entered a Burger King, Hamilton was able to inform the CI that the wire was not working. The CI, who was able to correct the problem (a loose connection), told Hamilton at that time that he and Spaulding were going "two or three restaurants past the Golden Banana." From that point Hamilton continued to follow the Nissan and to

⁵ Prough acknowledged that it "would have been a factor" to know that Spaulding never mentioned the words "cocaine" or "Massachusetts" to the CI on June 22, although he did not know whether it would have changed any probable-cause determination as to Fiasconaro.

monitor and record the conversation inside it, periodically relaying information to other units involved in the case via police radio.

In Peabody, Massachusetts, the Nissan veered onto Route 1, a roadway lined with businesses and restaurants. At approximately 6:30 p.m. the Nissan turned right into the parking lot of the Border Café, a Mexican restaurant, and Hamilton drove past and pulled into the parking lot of an adjacent restaurant, the Hilltop, radioing what had happened to other agents.⁶ From where Hamilton parked he was unable to observe the Nissan, but he continued to monitor its transmissions and to relay information to other agents involved in the case. He overheard Spaulding asking the CI where his phone was and Spaulding telling the CI minutes later, “He’s five minutes away.” *See Gov’t Exh. 3T at 5.* Approximately five minutes later, Hamilton heard the CI comment that a green car had just shown up, that Spaulding was getting into the back seat of that vehicle and that there were two white males in the front seats. *See id.* at 6. The CI next was overheard to say, “Okay were [sic] all set. Were [sic] taking off.” *See id.*

Hamilton could not determine, based solely on what he had heard, whether drugs or money had been exchanged; there was no statement by Spaulding that a drug deal had occurred. Hamilton drove his car to the end of the Hilltop driveway, waited for the Nissan to depart and, when it did so, followed it back to Maine, where eventually it was stopped by Maine State Police and a half-ounce of cocaine was seized. However, Hamilton has been involved in drug investigations in which drug deals do not occur.

Thomas E. Donovan, an agent assigned to the CBI, stationed his vehicle at the New Hampshire-Massachusetts border as part of the Spaulding surveillance effort at approximately 5 p.m. At about 6 or 6:15 p.m. he spotted the red Nissan heading southbound on Interstate 95 and began to

⁶ Hamilton testified that the Hilltop is separated by approximately twenty business establishments from the Golden Banana.

follow it. When the Nissan pulled into one side of the front of the Border Café parking lot, Donovan stopped his vehicle on the opposite side. Donovan exited his vehicle and followed the Nissan's passenger (Spaulding) when the latter got out and walked into the restaurant. Donovan observed that Spaulding looked around, did not meet with anyone and walked out. Spaulding then returned to the Nissan, which pulled from the front to the back of the parking lot. Donovan too drove to the back of the parking lot, stopping a few parking spaces away from the Nissan. He observed Spaulding standing outside of the Nissan leaning against a rail talking on a cell phone, then saw him get off the cell phone. Within fifteen minutes or less, he saw a green Honda Accord with two white male occupants pull into the back of the parking lot. At hearing, Donovan identified Fiasconaro as having been the driver. When the Honda stopped, Donovan observed from close range (fifty to one hundred feet away) that Spaulding went over to it, opened up the rear passenger door and got in the back seat. Donovan saw Spaulding leaning between the Honda's front bucket seats, seemingly conversing with the occupants, for approximately thirty to forty seconds. Then Spaulding got out and ran back to the Nissan. Donovan saw nothing in Spaulding's hands either on the trip over or the trip back from the Honda. The Honda (whose occupants had not changed places) started moving and Donovan pursued, ending up directly in front of it as both cars turned out of the parking lot onto Route 1. As all of these events were transpiring, Donovan was describing them via radio to others involved in the case including Prough, conveying "as many descriptive details as I could give."

Like Donovan, Prough awaited the approach of the red Nissan at the Massachusetts border off of Interstate 95. From shortly before the time he spotted the Nissan until the time Fiasconaro was arrested, he was able to monitor transmissions from the wire planted in the Nissan. He received communications from, or sent them to, other agents involved in the case every few minutes as events unfolded. As the Nissan approached, Prough pulled his vehicle onto Interstate 95, ending up in front

of the CI's vehicle. Prough heard Spaulding instruct the CI to go to a Mexican restaurant (which he wrongly assumed would be a Taco Bell). When the Nissan pulled into the Border Café parking lot, Prough pulled into an adjacent parking lot to maintain surveillance. From that vantage he overheard or was kept apprised that Spaulding had briefly entered the Border Café, that the Nissan had then moved, that Spaulding had spoken on a cell phone and then told the CI, "He'll be here in five minutes," that shortly after that a green Honda drove into the Border Café parking lot, that Spaulding entered the back seat of that vehicle, exited it less than a minute later and got back in the Nissan and that both cars were departing the parking lot.

Prough saw both vehicles turning south "in tandem" from the Border Café parking lot onto Route 1 – the only direction in which cars could turn. Prough pulled his car directly behind the Honda, from which vantage he observed the Nissan taking the next exit heading northbound on Route 1. He construed this as a sign that the CI and Spaulding were headed back to Maine, having received cocaine in the transaction. The Honda proceeded toward Main Street in Saugus, at which point Prough radioed Saugus police to stop the Honda and arrest its occupants. The Saugus police did so, whereupon the driver was identified for the first time as Fiasconaro and the passenger as William Albright.

The entire time the CI was in the Nissan with Spaulding on June 22, the CI never mentioned the presence of either money or cocaine. Nor did Donovan observe any exchange of drugs or money. Nor did anyone monitoring the wire transmitter hear Spaulding mention either the Honda or Fiasconaro or explicitly discuss buying or selling drugs.

Deetjen testified that in his experience as a drug agent, if following a brief rendezvous one participant says, "Okay, we're taking off," that means the deal is done. Prough also testified that words to the effect, "Okay, let's go," mean that the drug "meet" has occurred and that nothing further is

to transpire (although Prough erroneously believed that Spaulding, rather than the CI, had uttered words to that effect). Donovan testified that in his experience as a drug agent, the meeting between Spaulding and the occupants of the Honda was suspicious and showed indications that a drug deal may have transpired. In Donovan's experience, drug deals had occurred "from inside one car to another," and it was not uncommon to see nothing changing hands, although he acknowledged that he had been involved in drug investigations in which no deal actually had transpired.

From Prough's four years of experience with the CBI, he knew Lowell and Lawrence, Massachusetts to be source cities for the supply of cocaine to Vermont, New Hampshire and Maine. In Prough's view, the brief meeting between Spaulding and the occupants of the green Honda was typical of a drug transaction; it was "not a meeting to have coffee, lunch or drinks." This suspicious rendezvous, coupled with the information Prough previously had gleaned about the case, led him to believe that a drug deal had just occurred. He also drew the conclusion that, were the Honda to be searched, it would be found to contain the fruits or instrumentalities of such a transaction – money and possibly even cocaine. From Prough's experience, it is common that dealers never mention the name of their drug, referring to it, for example, as "it" or "stuff." In Prough's view, controlled buys suggest that the reliability of a confidential informant has been established or reestablished.

II. Discussion

Fiasconaro moves to suppress one statement, as well as certain items seized from the Honda and his person, on the alternative bases that (i) the court's determination that there was no probable cause for the issuance of a complaint against Albright compels the conclusion that, on virtually the same facts, there was no probable cause to arrest Fiasconaro, (ii) in any event, the warrantless arrest

of Fiasconaro was effectuated without probable cause, and (iii) the search of the Honda was conducted without probable cause to believe that it contained contraband or other evidence of criminal activity. Motion To Suppress at 6-14. I am unpersuaded.

A. Finding of “No Probable Cause” as to Albright

Fiasconaro initially points out that upon being presented with a criminal complaint in the instant matter naming Spaulding, Albright and himself, I struck Albright’s name from the complaint, “finding no probable cause as to him.” *Id.* at 6-7; *see also* Criminal Complaint (“Complaint”) (Docket No. 1) & endorsement thereto. Fiasconaro argues that inasmuch as the facts pertaining to both himself and Albright were virtually identical, *ipso facto* there could have been no probable cause as to either man. Motion To Suppress at 6-7. This argument fails for at least two reasons.

First, subsequent to the filing of the complaint in this matter the grand jury issued an indictment against Fiasconaro arising from the events of June 22, 2001. *See* Indictment. That indictment both superseded and mooted the complaint and constituted an independent finding of probable cause as to Fiasconaro. *See, e.g., United States v. Ramirez-Cortez*, 213 F.3d 1149, 1161 n.1 (9th Cir. 2000) (“the filing of an indictment supersedes the complaint”); *United States v. Conley*, 186 F.3d 7, 16 n. 4 (1st Cir. 1999) (“The standard of proof governing the grand jury decision to indict is probable cause, while the standard of proof governing the petit jury decision to convict is the much higher standard of proof beyond a reasonable doubt.”).⁷

Second, and in any event, the facts as to Fiasconaro set forth in the affidavit of DEA special agent Jay Stoothoff in support of the complaint were distinguishable from those as to Albright. Fiasconaro was described as both the driver and registered owner of the Honda. *See* Affidavit of Jay

⁷ I also take comfort that the First Circuit has stated in an unreported opinion, *United States v. Forde*, No. 93-1322, 1994 WL 390143, at **2 n.2 (1st Cir. June 30, 1994), “No doubt the later-obtained indictment superseded the complaint and, in that sense, mooted the question whether to dismiss that complaint. . . . Beyond question, an indictment constitutes a determination of probable (continued...)”

Stoothoff, attached to Complaint, ¶ 3. Per the Stoothoff affidavit, Spaulding referred in the singular to his “guy” prior to embarking on the trip to Massachusetts and told the CI after placing a cell-phone call from the Border Café, “I called him, he’s on the way.” *Id.* ¶¶ 2-3. According to Stoothoff, the CI also had reported that it appeared to him that Spaulding had expected to meet with only one person, the owner of the Honda. *Id.* ¶ 5. The earlier finding of “no probable cause” as to Albright did not require a parallel determination as to Fiasconaro.

B. Existence of Probable Cause To Arrest Fiasconaro

Fiasconaro next contends that, regardless, there was no probable cause to effectuate his warrantless arrest on June 22, 2001. Motion To Suppress at 7-11. When a defendant challenges a warrantless arrest, a court must scrutinize the “totality of the circumstances,” with “the government bear[ing] the burden of establishing that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a reasonable person in believing that the individual had committed or was committing a crime.” *United States v. Reyes*, 225 F.3d 71, 75 (1st Cir. 2000) (citations omitted).

At hearing, counsel for Fiasconaro argued that inquiry should focus on whether the arresting officer (in this case, Prough) possessed sufficient information on which to base a determination of probable cause, rather than on whether the collective knowledge of the officers involved sufficed.⁸ For this proposition he cited *United States v. Bashorun*, 225 F.3d 9 (1st Cir. 2000), and *United States v. Meade*, 110 F.3d 190 (1st Cir. 1997). Counsel for the government rejoined that this represented too narrow a construction of the First Circuit’s stand.

The First Circuit in *Meade* did indeed observe:

cause.”

⁸ Counsel repeatedly objected to the introduction of any evidence other than that relevant to what Prough knew. I overruled those objections, accepting the evidence *de bene*, and have included some of it in my proposed findings of fact, attempting to clarify who (continued...)

A sensible argument has been made that looking to the agency's knowledge as a whole is unwise because it may encourage the dissemination of arrest orders based upon nothing more than the hope that the unevaluated bits and pieces in the hands of several different officers may turn out to add up to probable cause. In the same vein, the collective-knowledge corollary of the fellow officer rule would seem to require, or at least presuppose, the flow of information from the officers with knowledge of facts tending to establish probable cause to those lacking that knowledge (or, at least, to the directing or arresting officer).

Meade, 110 F.3d at 194 (citations and internal quotation marks omitted). However, the First Circuit found it unnecessary to consider “the possible permutations of these principles nor choose between them because we find that both the directing officer and the arresting officer individually possessed the requisite knowledge, albeit from different facts, to establish probable cause.” *Id.* (footnote omitted).⁹ Nor, in *Bashorun*, did the First Circuit reach this issue, holding that by failing to raise a *Meade*-type argument in District Court the defendant had waived it on appeal. *Bashorun*, 225 F.3d at 12-13.

I, too, find it unnecessary to resolve the issues left open in *Meade* inasmuch as I determine that, even assuming *arguendo* that (i) the key question is whether Prough personally possessed adequate information to establish probable cause and (ii) the government bore the burden of establishing, rather than the defendant of rebutting, that predicate, that burden has been met.

At hearing, counsel for Fiasconaro portrayed Prough's probable-cause assessment as “a painting without paint,” lacking among other things any talk of cocaine, any observation of the transfer of drugs or money, and virtually any information about the background of the purportedly untrustworthy CI. I see the flaw not in the painting but in the perspective from which counsel suggests it be viewed – one that is too close to the canvas to discern the image portrayed.

Prior to June 22, Prough knew that the CI had made four successful controlled buys of cocaine from Spaulding, one of which consisted of the purchase of one ounce for \$1,000. This information

knew what when.

⁹ As the First Circuit noted, “[o]ne approach is to presume communication [among officers involved in the case], absent the (continued...) ”

was of great importance, establishing not only that Spaulding was trafficking in significant quantities of cocaine but also that, whatever the CI's previous background, for purposes of the Spaulding case he was proving reliable. *See, e.g., United States v. Winchenbach*, 197 F.3d 548, 556 (1st Cir. 1999) (“[T]he risk that [an] informant is lying or in error need not be wholly eliminated. Rather, what is needed is that the probability of a lying or inaccurate informer has been sufficiently reduced by corroborative facts and observations. In our view, the evidence gathered here, including several recorded conversations between Holmes (who at times wore a body wire) and Spinney and the agents’ own observations (especially those pertinent to the third transaction), affords sufficient corroboration to reduce the risk of error to an acceptable level.”) (citation and internal quotation marks omitted); *United States v. Khounsavanh*, 113 F.3d 279, 287 (1st Cir. 1997) (noting that, although confidential informant’s controlled purchases were “not free of problems,” the “corroboration of the informant’s story did not consist merely of corroborating some innocent facts that any number of people might know. This was corroboration of the very criminal activity which the police were investigating, and of the existence of contraband or evidence on the premises to be searched.”).

Prior to June 22 Prough also had learned from Deetjen that Spaulding’s source was in Massachusetts. Although Prough did not press Deetjen on the precise origin of that information, on the basis of the series of controlled purchases Prough reasonably could have trusted his longtime colleague Deetjen’s judgment that the CI was reliable. Moreover, the underlying information was not without solid basis. During the April 12th controlled purchase the CI had asked Spaulding if he went to Massachusetts, and Spaulding replied that he did and that it was a three-hour round-trip. Deetjen reasonably could have drawn the inference these were trips to purchase cocaine, given the context of the discussion – a cocaine purchase during which the CI offered to provide “transportation” and

defendant’s rebuttal.” *Meade*, 110 F.3d at 194 n.4.

Spaulding agreed to call him for the next trip. *See United States v. Taylor*, 985 F.2d 3, 6 (1st Cir. 1993) (“[O]fficers are entitled to draw reasonable inferences from [] facts in light of their knowledge of the area and their prior experience. . . .”) (citation and internal quotation marks omitted).

With this as backdrop, Prough was informed by Deetjen on the pivotal day, June 22, that the CI was planning imminently to drive Spaulding to Massachusetts for a cocaine purchase. Although, again, Prough did not press Deetjen on how this information was derived – *e.g.*, whether the words “Massachusetts” and “cocaine” actually had been used or whether the CI could be trusted to relay such information accurately – Prough again reasonably relied on Deetjen’s judgment that the information was trustworthy. Moreover, the information did in fact have solidity. Deetjen reasonably had construed Spaulding’s statement to the CI, “My guy’s waiting for me to come down right now,” as meaning that Spaulding’s cocaine supplier in Massachusetts was waiting. Spaulding had uttered the statement in response to the CI’s bemoaning that Spaulding had inadequate supply (only three ounces) for the CI’s purported planned resale of five ounces to a third party, and after the CI had inquired whether the CI would be providing transportation that day.

Once Prough joined in surveillance of the red Nissan as it crossed the Massachusetts border, he personally observed, overheard or was kept apprised of all significant details of the unfolding drama. He knew that the Nissan had pulled into the Border Café parking lot; that Spaulding had briefly walked into the restaurant, looked around and gone back out to the car; that Spaulding then had placed a cell-phone call and told the CI, “He’ll be here in five minutes,” that about five minutes later a green Honda occupied by two white males drove into the Border Café parking lot and toward the area where the Nissan was parked; that Spaulding got into the back seat of the Honda, leaned forward through the bucket seats, and exited less than a minute later; that both the Nissan and Honda then pulled

out of the parking lot “in tandem” onto Route 1 south; and that the Nissan turned north on Route 1 while the Honda continued in a different direction.

This scenario was all highly consistent with of a drug transaction – including the use of the cell phone, the arrival of the Honda, Spaulding’s brief visit to the back seat of the Honda, the immediate departure of both vehicles and the Nissan’s quick reversal of direction to head northward. As Prough aptly put it, this was “not a meeting to have coffee, lunch or drinks.” That neither the CI nor Spaulding was overheard to mention cocaine or money on June 22, that Fiasconaro’s identity was unknown prior to his arrest and that nothing was witnessed in Spaulding’s hands as he shuttled back and forth from the Honda was neither surprising nor particularly significant. Prough reasonably viewed the totality of the circumstances as painting a portrait of a drug transaction. *See, e.g., Winchenbach*, 197 F.3d at 555-56 (“The probable cause standard does not require the officers’ conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable.”)¹⁰

Inasmuch as Prough possessed probable cause to effectuate Fiasconaro’s arrest, the seizure of currency from Fiasconaro’s person, as well as currency and the cell phone from the passenger compartment of the Honda, was justified as “incident to” that arrest. *See, e.g., Meade*, 110 F.3d at 199 (“If an arrest is lawful, the arresting officers are entitled to search the individual apprehended pursuant to that arrest.”) (citation and internal quotation marks omitted); *United States v. Infante-Ruiz*, 13 F.3d 498, 502 n. 1 (1st Cir. 1994) (“[W]hen a police officer makes a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the

¹⁰ In his Motion To Suppress, Fiasconaro also argues (i) that at the time of his arrest, officers harbored at most a “mere suspicion” that he had committed a crime, sufficient to have stopped and questioned him but not to have arrested him, (ii) there is a potential for “tainting” in multiple-defendant cases in which a suspect whose criminality has been established is observed meeting with a previously unknown person under vaguely suspicious circumstances, with “mere propinquity” insufficient to give rise to probable cause, and (iii) that retrospective “bootstrapping” of probable-cause determinations can occur inadvertently in cases when a seizure or arrest proves to have been appropriate in light of events occurring subsequent to the arrest or search. Motion To Suppress at 7-9. For the finish, Fiasconaro does not succeed in fitting the square pegs of the facts of this case into the round holes of these theories. For the reasons discussed above, Prough had adequate probable cause to arrest Fiasconaro as of the moment of arrest.

car's passenger compartment and any containers found within it. The 'passenger compartment' has been interpreted to mean those areas reachable without exiting the vehicle and without dismantling door panels or other parts of the car.") (citations and internal quotation marks omitted). There is no basis on which to suppress Fiasconaro's statement that he was the owner of the vehicle as "fruit of the poisonous tree."

C. Vehicle Search Justification

The determination that Fiasconaro's arrest was accomplished with probable cause obviates the need to address Fiasconaro's final argument – that law-enforcement officers had no probable cause to search the Honda pursuant to the so-called "*Carroll Doctrine*." See Motion To Suppress at 13. However, for the sake of completeness, I touch on it briefly. Per the *Carroll Doctrine*, even had officers lacked probable cause to arrest Fiasconaro, they permissibly could have conducted a warrantless search of the Honda had they probable cause to believe it contained contraband or evidence of criminal activity. *Carroll v. United States*, 267 U.S. 132, 162 (1925); see also, e.g., *United States v. Cleveland*, 106 F.3d 1056, 1063 (1st Cir. 1997), *aff'd sub nom. Muscarello v. United States*, 524 U.S. 125 (1998), *recognized as abrogated on other grounds by Brache v. United States*, 165 F.3d 99 (1st Cir. 1999).

Prough having witnessed conduct suggestive of a drug transaction involving a known cocaine dealer, he had probable cause to believe that the Honda contained contraband or other evidence of criminal activity.

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, 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 this 26th day of November, 2001.

David M. Cohen
United States Magistrate Judge