

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 04-43-P-S
)	
HANSANA VONGKAYSONE and)	
PHONTHEP VONGKAYSONE,)	
)	
Defendants)	

RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

Hansana Vongkaysone and Phonthep Vongkaysone, each charged in a one-count indictment with conspiracy to distribute, and possess with intent to distribute, a substance containing cocaine and fifty grams or more of a substance containing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846, *see* Superseding Indictment (Docket No. 66)¹, seek to suppress statements and other evidence on the basis of their asserted arrest without probable cause and, in the case of Phonthep,² transgression of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), *see* Motion To Suppress Evidence Gained From a Constitutionally Infirm Arrest[,] Search and Seizure and Statements Taken Therein (“Hansana Motion”) (Docket No. 54); Motion To Suppress, etc. (“Phonthep Motion”) (Docket No. 56); *see also*

¹For sentencing purposes, the Indictment charges that (i) Hansana Vongkaysone conspired to distribute and to possess with intent to distribute at least 1.5 kilograms of cocaine base and at least 3.5 kilograms of cocaine, (ii) Phonthep Vongkaysone conspired to distribute and possess with intent to distribute at least 500 grams of cocaine, and (iii) the relevant conduct in this case as to Hansana Vongkaysone, as defined in United States Sentencing Commission Guidelines § 1B1.3, includes at least 15 kilograms of cocaine and at least 1.5 kilograms of cocaine base. *See* Indictment.

² To avoid confusion, I shall refer to each of the defendants by his first name.

Memorandum of Law in Support of a Motion To Suppress Evidence Gained From a Constitutionally Infirm Arrest[,] Search and Seizure and Statements Taken Therein (“Hansana Memorandum”) (Docket No. 53). Evidentiary hearings were held before me on August 25 and September 2, 2004 at which both defendants appeared with counsel. I now recommend that the following findings of fact be adopted and that both motions to suppress be denied.

I. Proposed Findings of Fact

On January 11, 2004 Paul Buchanan, a United States Drug Enforcement Agency (“DEA”) special agent, was told by a confidential informant that an individual known as “Jimmy” was planning to make a trip from Portland, Maine, to Massachusetts and return that afternoon with a quantity of crack cocaine. From a prior investigation, Buchanan knew that Jimmy’s name was Huang Nguyen.³ On several occasions prior to January 11, through controlled purchases, DEA agents had bought a quantity of crack cocaine from Nguyen.

Buchanan called the Maine State Police (“MSP”) and issued a lookout for the white vehicle that he had seen Nguyen driving during previous controlled purchases. The MSP stopped the vehicle, searched it, finding two ounces of a white-powder substance that appeared to be (and later was confirmed to be) cocaine base, and arrested its occupants, Nguyen and an Asian female, Dong Lee.⁴ Upon being apprised that the vehicle had been stopped, Buchanan traveled to the MSP South Portland barracks, where Nguyen and Lee were being held. Nguyen agreed to cooperate, telling Buchanan that he was a runner for Lee and that, for the past three or four months, he had been making three to four trips weekly to Lowell,

³ In the absence of any testimony or other evidence as to the spelling of this name, I have spelled it phonetically.

⁴ In the absence of any testimony or other evidence as to the spelling of this name, I have spelled it phonetically.

Massachusetts, to purchase two ounces of crack cocaine from someone he knew only as “Boy” or “Little Boy.”

The following day, at agents’ request, Nguyen placed a recorded phone call to Little Boy in Lowell during which he made arrangements to purchase two ounces of cocaine base from him at a designated parking lot in Lowell. Buchanan accompanied Nguyen to the designated place. Shortly thereafter, a vehicle fitting the description Nguyen had given (a silver Honda Prelude) entered the parking lot and pulled up next to Nguyen’s vehicle. DEA agents detained and searched its occupant, whom Nguyen positively identified as Little Boy. They seized two ounces of a substance that appeared to be crack cocaine from Little Boy’s jacket pocket. Little Boy, who was identified as Eddy Phanthai, agreed to cooperate with the agents. Buchanan had not previously heard of Phanthai and had no dealings with him prior to his arrest.

On January 16 several DEA agents, including Buchanan, Steven Thibodeau, a Scarborough, Maine police officer assigned to the DEA as a federally deputized task-force agent, and Sheila Wetherbee, a Cumberland, Maine police officer also assigned to the DEA as a federally deputized task-force agent, conducted an interview with Phanthai pursuant to a proffer agreement. Phanthai told agents that his source of supply was an individual whom he knew only as “Na” and that he would meet Na once a week to purchase ten to fifteen ounces and sometimes as much as a half-kilo (seventeen ounces) of cocaine powder. He stated that he would pay approximately \$800 an ounce for the cocaine powder, which he would then cook into crack cocaine for sale to his customers in Maine. He said that initially he had purchased crack cocaine from Na; then, in a visit to Phanthai’s apartment, Na had taught him how to cook the powder into crack cocaine. In Buchanan’s view, Phanthai’s description of what he had been doing was consistent with what Buchanan had learned from Nguyen.

Phanthai described Na as a light-skinned Asian male about thirty years old, clean-cut, fairly well-dressed, with short hair, about 5 feet 7 or 5 feet 8 inches tall and weighing approximately 160 pounds. He described Na's dress as clean casual, noting that he usually wore a collared shirt, slacks and nicer shoes. Phanthai said that he also had often seen Na wearing a nice jacket.

He said that he knew Na was from Rhode Island and that Na typically drove a tannish-colored Nissan with Rhode Island license plates. He told agents that he usually would call Na on a Sunday and meet him the following day somewhere in Lowell, typically either inside, or in the parking lot of, a Vietnamese or Cambodian restaurant. Na would pick the meeting place and usually did not inform him of it until a few minutes prior to the deal. He said that Na was always on time – sometimes a few minutes early – and that Na generally arrived before he did. Typically Na would be inside the restaurant. In that case, Phanthai would go to Na's vehicle, put the money in the glove box and remove the drugs, which usually were somewhere in the front where he could find them easily. On other occasions Na would be in his car in the parking lot, Phanthai would enter Na's car and they would conduct the transaction there.

Phanthai told agents that Na's practice was to package the drugs in 100-gram bags so that, for example, if Phanthai ordered 300 grams, he would find three separate clear baggies. These baggies, in turn, would be inside a plastic, supermarket-type shopping bag. Phanthai reported that Na usually came alone but occasionally was accompanied by his cousin, and that at least once he had sent his cousin in his place. Phanthai described Na's cousin as an Asian male, 5 feet 7 inches tall, with a little thinner build than Na, short hair and a dress style similar to Na's. Phanthai said he had sometimes spoken Laotian to Na and Na's cousin, but generally on the phone he spoke English. Phanthai made no mention that either Na or Na's cousin carried weapons.

Following this interview, Buchanan arranged for Phanthai to place a recorded phone call to Na to order that week's cocaine. Buchanan initiated a process to trace the phone number Phanthai called; however, as of the time of the defendants' arrest the number had not been verified, and the officers had only Phanthai's word that he was in fact phoning Na.

From Sunday, January 18 through Friday, January 23, in Buchanan's presence, Phanthai made a series of recorded phone calls to a person he identified as Na. The calls were placed from a room at the Old Colony Correctional Center in Bridgewater, Massachusetts, where Phanthai was incarcerated. Buchanan observed that the person whom Phanthai called appeared to know Phanthai, and seemed to have spoken to him before.

On two occasions, a planned meeting fell through. At approximately 4:40 p.m. on January 23, Buchanan recorded a final phone call to the individual Phanthai said was Na, setting up a meeting for 6:45 that evening at the Thanh Thanh Restaurant ("Thanh Thanh") on Chelmsford Street in Lowell. Phanthai ordered a "half," which he later explained to Buchanan meant a half-kilo of cocaine. No arrangements were made that Phanthai would have any further contact with Na prior to the meeting, and in fact no contact was had. Phanthai did not ask, nor did the person he identified as Na specify, whether Na would be traveling alone, with his cousin or with anyone else. Buchanan credibly testified that in making drug-transaction arrangements, such a question typically would not be asked and that one quickly learns not to ask too many questions to avoid scaring people off.

Buchanan relayed the information he had obtained to other DEA agents. At approximately 6 or 6:15 p.m. he departed the jail and began driving toward the Thanh Thanh Restaurant in Lowell. He was in constant contact with agents on the scene as he drove.

Sometime between 5 and 5:30 p.m. DEA agents who were to be involved in the anticipated operation convened at the Lowell office of the Cross-Border Initiative (“CBI”), a DEA task force composed of federal, state and local law-enforcement officers.⁵ As per standard DEA policy, agents were given copies of a written operational plan, and Wetherbee briefed them concerning the imminent operation, including Phanthai’s descriptions of the suspects’ physical characteristics.

Thibodeau, who was among those present for the briefing, recalled that it lasted approximately fifteen minutes and that agents were told that at least one Asian male, if not two, was expected to arrive at the Thanh Thanh in a vehicle with Rhode Island plates, which should or could be a tannish colored Nissan-type vehicle, that the suspect was expected to arrive at about 6:45 p.m. and was generally on time, and that he was expecting to meet with Phanthai to deliver cocaine. Thibodeau also remembered having been informed that the suspect always brought the product – the cocaine – with him in a shopping bag. The plan was to conduct surveillance, be on the lookout for any suspicious activity in the parking lot, observe whether a vehicle and people matching the descriptions arrived, and arrest them as appropriate.

At approximately 6:20 p.m., agents traveling in at least three separate vehicles departed the CBI office and drove the short distance to the Thanh Thanh on Chelmsford Street to establish surveillance.⁶ Chelmsford Street is a busy commercial area, with restaurants and other businesses lining both sides of the street and a great deal of vehicular traffic. The Thanh Thanh has two entrances into its parking lot, a rear entrance from Powell Street and a front entrance off of Chelmsford Street. *See* Gov’t Exh. 3. Agents

⁵ Wetherbee testified that agents were at the CBI office in Lowell an hour to an hour and a half before they deployed because they were waiting for a phone call from Buchanan, who was with Phanthai.

⁶ Agents who testified diverged as to whether surveillance was established at 6:20 p.m. or 6:30 p.m. However, the difference is minor and immaterial.

Wetherbee and John Bosse⁷ took up a position on a side street off of Powell Street, with a view of the rear entrance to the Thanh Thanh and an obscured view of its parking lot (mostly of headlights and shadows); agents Gregory Boucher, Barry Kelly⁸ and two others stationed themselves in the parking lot of a business across Chelmsford Street, with a clear view of the front entrance to the Thanh Thanh and its parking lot; and agents Thibodeau, Greg Coletti and Bill Hanlin (DEA task force supervisor)⁹ pulled into the parking lot of a Store 24 adjacent to the Thanh Thanh, alongside a guardrail separating the Store 24 parking lot from the Thanh Thanh parking lot, with a clear view of the Thanh Thanh parking lot. *See id.* Throughout the operation, agents were in constant radio contact with one another, relaying observations from their different vantage points. It was January and dark outside; however, Thibodeau recalled that the Thanh Thanh parking-lot area was lit. Phanthai was not at any point on the scene to assist in identifying the suspects or their vehicle.

At 6:44 p.m. Thibodeau observed a dark-colored Acura with Rhode Island license plates, occupied by two individuals, pull into the Chelmsford Street entrance to the Thanh Thanh.¹⁰ The Acura parked in the left rear portion of the Thanh Thanh lot, with the driver's side facing Thibodeau. Shortly thereafter (by one report, at 6:55 p.m.) a red Honda pulled into the Powell Street entrance to the Thanh Thanh and backed into a parking spot near the Thibodeau vehicle. Thibodeau observed a male get out of the passenger side of the Honda and walk over to the passenger side of the Acura. He saw the Honda passenger lean into the

⁷ In the absence of any testimony or other evidence as to the spelling of this name, I have spelled it phonetically.

⁸ In the absence of any testimony or other evidence as to the spelling of this name, I have spelled it phonetically.

⁹ In the absence of any testimony or other evidence as to the spelling of Coletti's and Hanlin's names, I have spelled them phonetically.

¹⁰ Thibodeau testified that he could not recall having, himself, identified the two individuals as two Asian males but that someone else had positively identified them as such. Boucher testified that, from his vantage across Chelmsford Street, he observed a gray Acura with Rhode Island plates pulling into the Thanh Thanh parking lot at about 6:45 p.m., that he saw two people inside but could not get a good look at them and that he heard someone else over the radio identifying
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rolled-down window of the Acura, appearing to engage in conversation; however, he saw nothing being exchanged and could not overhear any conversation. Boucher, who also observed these events, testified that the interaction between the Honda and Acura occupants lasted thirty seconds to one minute. The Honda passenger returned to the Honda, which promptly departed via the rear, or Powell Street, exit.

There was radio communication among agents that a transaction suspicious of drug dealing had occurred. Wetherbee and Bosse observed the Honda pulling out of the parking lot, strained to read its plate number and each called out part of the plate number over the radio. They did not write the plate number down and later learned that none of the other agents had, either. No one suggested or ordered that the Honda be followed or stopped, and it went on its way. Wetherbee testified that she did not recall the registration number of the Honda; however, she was certain that it had Massachusetts plates.

After the Honda left, Thibodeau saw the Acura back into the parking space that the Honda had occupied, with the front of the vehicle facing the restaurant. The Acura at that point was about ten feet away from the Thibodeau vehicle. Thibodeau did not recall observing any furtive or suspicious movements within the Acura; in fact, he did not recall looking through its rear window.

At that time, there were no other cars in the parking lot in which people were sitting and waiting. During the entire period of surveillance, no other cars with Rhode Island plates had been observed within, or coming or going from, the Thanh Thanh parking lot. After a minute or two, the Acura moved across the parking lot and parked facing the restaurant. Thibodeau observed its driver get out, go to the window of the restaurant, peer in, cupping his hands, and then return to the car.¹¹ From across the street Boucher also observed the driver, who appeared to Boucher to be an Asian male, get out, peer into the window, glance

them as “potentially two Asian males.”

about the parking lot and then get back into the Acura. Wetherbee recalled that following this development, there was a great deal of radio traffic among the agents as they discussed the details of what they had seen, including the timing of the vehicles, the Rhode Island plates and the description of the suspects, and that she was confident they had the right people. Hanlin and Coletti gave the command to move in. The agents drove their vehicles in toward the Acura, boxing it in, with the Thibodeau vehicle behind it, the Boucher vehicle near the driver's side and the Wetherbee vehicle near the passenger's side. *See id.* One of the agents ordered the occupants out of the vehicle, and they complied.

Wetherbee approached the passenger side and placed her hands on the passenger as he exited, leading him to the hood of her vehicle. She observed that he had short hair, was about her height (5 feet 7 inches tall), was wearing a nice jacket, possibly leather, a button-up dress shirt and nice, clean jeans. It was her opinion that, but for the fact that he was wearing jeans rather than dress slacks, he fit the description Phanthai had given. She asked him his name, which he said was Hansana. She reasoned that "Na," the last two letters of the name "Hansana," could be his nickname and asked him if he went by the name "Na." He did not answer, and when she asked if he had any nicknames, he said he did not know. She retrieved his wallet from his back pocket, in which he had identification indicating that he was Hansana Vongkaysone. Bosse reached into Hansana's pocket and pulled out what appeared to be a great deal of money. Because it was very cold out, and Hansana was complaining he was cold, the agents did not then count the money. Hansana was not handcuffed immediately but, rather, after a few minutes had elapsed. Wetherbee agreed that it was fair to say that when she escorted him from the car, he was not free to leave.

¹¹ Thibodeau testified that he recalled observing that the driver was an Asian male of average size, but he did not recall how the driver was dressed.

At the same time as Wetherbee approached the passenger side of the Acura, Boucher and Coletti approached the driver's side. Boucher, with his gun drawn but pointed downward, ordered the driver to put his hands up. The driver immediately complied, and Boucher holstered his firearm. He then ordered the driver to step out as he opened the driver's door. The driver exited, and Boucher and Coletti handcuffed him. As Boucher was approaching the vehicle he performed a "visual sweep" to check for other occupants and saw none. He did not actually search the vehicle and did not notice any bag in it. Once the driver was handcuffed, and before he was even identified, Boucher left him with Coletti and returned to the CBI office, considering his job to have been done.

After Hansana was secured, Wetherbee asked that the driver be turned to face her so that she could look at him. This was done, and she observed another Asian male who was thinner than Hansana but had a hairstyle and dress similar to Hansana's, consistent with Phanthai's description.¹²

As his fellow agents were confronting the occupants of the Acura, Thibodeau approached it from behind with gun drawn to "cover," or protect, them. He "cleared" the vehicle, first looking through the rear window and then inside the passenger-side door, which by then was open, to check for other persons. He saw no other occupants but did observe a brown plastic shopping bag on the floor of the front passenger seat. He reached in, picked it up and looked in it, whereupon he observed that it contained a white powdery substance that appeared to be cocaine.¹³ He promptly notified the other agents of his discovery and gave the bag to Hanlin. No one told Thibodeau the suspects were under arrest before he looked inside the bag, nor had the suspects consented to a search.

¹² Wetherbee testified that she recalled that Phonthep was wearing a collared, button-up shirt, but she did not recall whether he was wearing a jacket over it.

¹³ Thibodeau did not recall how the cocaine itself was packaged, other than that it was not loose in the shopping bag and was in at least one clear plastic bag.

Wetherbee recalled that, as she was dealing with Hansana at the hood of her car, she could see Thibodeau checking out the suspects' vehicle, calling out that he was checking the back seat and that no one was there and then yelling out that he thought he had found the bag of cocaine.

Buchanan arrived at the Thanh Thanh at approximately 7 p.m., which he estimated was within five minutes of the time the defendants had been detained. Per prior arrangement with the CBI, uniformed Lowell police officers transported the defendants to the Lowell Police Department ("LPD"). Buchanan and other agents followed. At the LPD, Buchanan and Wetherbee separately interviewed each of the defendants. At the outset of each interview, Buchanan read each defendant his *Miranda* rights verbatim from a card known as "DEA Form 13-A." Each defendant indicated by nodding and saying "yes," that he understood those rights. Each agreed to waive those rights and talk to the agents.

Buchanan spoke English to both Hansana and Phonthep. Although Wetherbee observed that Phonthep was very quiet, she said that he spoke in understandable English. Wetherbee described Buchanan as having spoken clearly and slowly while advising the defendants of their *Miranda* rights, and taking the time to make sure he was understood. Both Phonthep and Hansana appeared to understand Buchanan, neither requested a translator, each answered his questions appropriately, and each appeared to understand his *Miranda* rights. Buchanan did not ask the LPD if it had a *Miranda* form pre-printed in Laotian that he could use.

II. Discussion

A. Arrest and Search

Both Hansana and Phonthep assert that the agents who approached them with guns drawn and placed them under arrest on the evening of January 23, 2004 lacked probable cause to (i) arrest them, (ii) search their persons and vehicle, or (iii) seize items therefrom. *See* Hansana Memorandum at 6-9;

Phonthep Motion at 3-5. They seek suppression of the “fruit of the poisonous tree” – namely, tangible evidence and statements obtained as a result of the assertedly illegal arrest, search and seizure. *See* Hansana Memorandum at 5-6, 9; Phonthep Motion at 1, 5; *see also, e.g., Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *United States v. Fiasconaro*, 315 F.3d 28, 34 (1st Cir. 2002) (“Generally, if an arrest is not based on probable cause, then statements and evidence obtained as a result of the arrest are inadmissible.”).¹⁴

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). “[T]hough probable cause requires more than mere suspicion, it does not require the same quantum of proof as is needed to convict.” *Logue v. Dore*, 103 F.3d 1040, 1044 (1st Cir. 1997).

The government contends that, at the time agents closed in on the Acura, they had probable cause to stop and search the vehicle. *See* Government’s Objection to Defendants’ Motion[s] To Suppress, etc. (“Objection”) (Docket No. 59) at 5-9. The government posits that agents developed probable cause to arrest the occupants upon discovering the suspected cocaine or, alternatively, possessed probable cause to arrest them from the initiation of the stop. *See id.* at 9-11. Finally, the government argues that even in the absence of probable cause, agents properly effectuated a so-called “*Terry* stop” for purposes of further investigation, whereupon they developed probable cause to arrest the defendants. *See id.* at 11-13. I

¹⁴ Hansana specifically seeks to suppress cash seized from his right front pocket, cocaine seized from the vehicle and
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agree that, from the outset of the stop, agents had probable cause to arrest the occupants of the Acura and search the vehicle. Thus, I do not reach the government’s alternative *Terry*-stop argument.

1. Probable Cause To Arrest

At oral argument following the close of evidence, defense counsel distinguished the instant case from *Fiasconaro* – a case in which the First Circuit found that probable cause to effectuate the warrantless arrest of a suspected cocaine dealer “overflowed.” *Fiasconaro*, 315 F.3d at 35. In *Fiasconaro*, DEA agents effectuated a warrantless arrest of Fiasconaro and a co-defendant, Murray Spaulding, in a restaurant parking lot after, in a monitored and recorded conversation, a confidential informant (“CI”) arranged to accompany Spaulding on a trip to purchase cocaine from his source in Massachusetts. *See id.* at 32-34. As the First Circuit noted, the probable-cause determination in *Fiasconaro* “was supported by three pillars of evidence[,]” *id.* at 35:

1. The statement of the CI, a reliable informant, that the purpose of Spaulding’s trip to Massachusetts was to purchase cocaine. The First Circuit observed, “The reliability of an informant is critical to our determination of whether that informant’s statements can support a police officer’s finding of probable cause.” *Id.* In *Fiasconaro*, one of the agents had described the CI as the best informant he had ever worked with. *See id.* The CI’s information had resulted in federal indictments of five or six persons, all of whom had pleaded guilty, and “[e]ven more important,” the agent had been able to corroborate specific information provided by the CI through recorded and monitored observations of controlled drug purchases from Spaulding. *See id.*

a statement taken from him. *See* Hansana Memorandum at 9.

2. Incriminating statements made by Spaulding to the CI during the car ride from Maine to Massachusetts, transmitted in real-time (via a hidden wire) to officers involved in the investigation. *See id.* at 33, 36.

3. Observations by police in the parking lot of the Massachusetts restaurant where the transaction was expected to take place. *See id.* at 36. As the First Circuit described this “pillar”:

Once Spaulding and the informant arrived in the parking lot, Spaulding exited the car and used his cellular phone. Spaulding then reentered the car and Prough [one of the agents] heard him say over the transmitter, “the guy is on his way.” Shortly thereafter, a green Honda pulled into the parking lot. Spaulding was seen leaving the informant’s car and going to the Honda. He was in the Honda not longer than forty seconds. While in the Honda, Spaulding was observed leaning between the front seats of the Honda, speaking briefly to the occupants and then quickly returning to the informant’s car. Although none of the observing officers saw money or drugs change hands, it was the opinion of the officers that based on their experience, there had been a purchase of drugs by Spaulding and what transpired was typical of a drug transaction.

Id. at 36-37.

At oral argument, defense counsel emphasized that (i) in this case there was no past history with Phanthai on the basis of which his reliability could have been assessed, (ii) agents had only Phanthai’s word – no independent verification – concerning the identity of the person to whom the calls were being placed, (iii) Phanthai was not present at the scene of the stop to identify Na, his cousin or the vehicle, (iv) there were no corroborating phone calls between Phanthai and Na during the period of time Na purportedly was *en route* to the meeting, (v) some of the events that unfolded on January 23, 2004 contradicted, rather than corroborated, Phanthai’s predictions – for example, the meeting time and location were arranged at least two hours in advance, rather than ten minutes in advance as Phanthai had said typically was Na’s practice, and the vehicle that agents ultimately stopped was a gray Acura rather than a tannish Nissan, (vi) no one got a good look at Hansana Vongkaysone, who remained seated inside the vehicle on a dark, cold January

night, before agents moved in, (vii) no one knew who the occupants of the Acura were before agents moved in, (viii) no one bothered to check out the red Honda that the agents now maintain engaged in a suspicious transaction with the Acura, and (ix) no one observed the occupants of the Acura conducting counter-surveillance, making furtive gestures or handling anything.

Defense counsel further posited that:

1. Although DEA agents were expecting only Na, the Acura contained two passengers.
2. The actions of the occupants of the Acura were inconsistent with what Phanthai had described as Na's *modus operandi* of either (i) waiting inside the restaurant and remaining there while Phanthai took the drugs from Na's vehicle and left the money there, or (ii) sitting in his car in the parking lot, whereupon Phanthai would enter Na's vehicle and the men would conduct the transaction there. In this case, defense counsel observed, the driver got out, cupped his hands and peered inside the restaurant window as if looking for someone; yet Phanthai had never said that he himself went into the restaurant.

In defense counsel's view, all that the agents had to go on was the Thanh Thanh, the timing (that the car appeared at the predicted time) and the Rhode Island license plates, all of which were insufficient to add up to probable cause either to arrest the Acura's occupants or search the Acura for the presence of contraband. *See* Hansana Memorandum at 8 ("The only information available to the agents [was that Na] was Asian and arrived in an automobile at about the same time as the expected source of supply in a car that had a Rhode Island license plate. There was no connection between the defendant and the alleged supplier 'Na' who the C.W. had spoken to on the phone or the driver. No further corroboration took place at the scene of the arrest. No one stated 'Na' was in the car, or if he was in the car was he the driver or the passenger."); *see also* Phonthep Motion at 5 ("There were three unremarkable observations made by law enforcement officials in this matter, namely: (1) the observation that the vehicle driven by the Defendant

had Rhode Island license plates; (2) the ‘exchange’ between the passenger riding in Defendant’s vehicle and a third party; and (3) the peering into the restaurant window by the Defendant[.]”).

Without question, agents in the instant case had less to go on than those in *Fiasconaro*. Yet, in *Fiasconaro*, agents had “ample” probable cause. *See id.* at 37. Here, at the moment the order was given to move in on the Acura, agents likewise possessed probable cause to believe that its then-unknown occupants had committed or were about to commit a crime (namely, cocaine trafficking). Although, in this case, agents had no past dealings with Phanthai, and the events of January 23, 2004 did not jibe in some respects with Phanthai’s descriptions, these deficiencies are not in my view fatal under the totality of the circumstances. *See, e.g., United States v. Meade*, 110 F.3d 190, 198 n.11 (1st Cir. 1997) (“probable cause is a common sense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act”) (citation and internal punctuation omitted).

First, as counsel for the government posited at oral argument, Phanthai made statements against interest, in the sense that he implicated himself (as well as Na and Na’s cousin) in criminal conduct. This bore on, and tended to bolster, his credibility and the likely reliability of his statements. *See, e.g., United States v. Johnson*, 289 F.3d 1034, 1040 (7th Cir. 2002) (noting that the “reliability of [an] informant inheres in his statements against interest”; observing, “In this case, the CI admitted prior drug distribution and use. The CI’s affidavit stated that he had ‘purchased, packaged, and sold cocaine,’ and that the CI was ‘familiar with the color, texture and smell of cocaine from previous experience.’ This information added to the court’s finding of reliability.”) (citation and internal quotation marks omitted); *United States v. Principe*, 499 F.2d 1135, 1137 (1st Cir. 1974) (“The informant was both named and was revealed as a

participant in the crime. The informant's knowledge was obtained from recent personal observation. That [the informant] was making a declaration against interest lends it further credence.”).

What is more, the statements of an informant need not be borne out in all respects for an officer reasonably to conclude they are, on the whole, 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.”) (citation and internal quotation marks omitted); *United States v. Diallo*, 29 F.3d 23, 26 (1st Cir. 1994) (“According to defendants, the information [provided by an informant] was unreliable because the informant stated that there would be three men in a red Toyota when in actuality there were four men in two cars. The inconsistencies between the informant's information and the reality of the situation were not of such importance that the information could be concluded to be incorrect. The informant was correct as to the identities of three of the four men along with the night the activity would take place and one of the vehicles used. A tipster need not deliver an ironclad case to the authorities on the proverbial silver platter. It suffices if a prudent law enforcement officer would reasonably conclude that the likelihood existed that criminal activities were afoot, and that a particular suspect was probably engaged in them.”) (citation and internal punctuation omitted).

In this case, while agents had not yet traced the phone number Phanthai had dialed, they could hear him placing several calls to a person who seemed to recognize him and ultimately agreed to sell him a “half,” or half-kilo of cocaine, at the Thanh Thanh at 6:45 on the evening of January 23, 2004. Phanthai had said Na typically drove a tannish-colored Nissan with Rhode Island plates, was always on time (if not early) and sometimes was accompanied by his cousin. These critical details were largely corroborated when agents observed a gray Acura with Rhode Island plates pull into the parking lot of the Thanh Thanh at precisely

6:44 p.m., occupied by what appeared to be two Asian males. No other cars with Rhode Island plates then occupied the lot, nor were any observed to arrive in the approximately fifteen minutes before agents closed in.

What is more, defense counsel's argument notwithstanding, the conduct of the Acura's occupants was not inconsistent with Phanthai's description of Na's *modus operandi*. Phanthai had said Na sometimes met him in the parking lot and transacted business with him inside Na's vehicle. The occupants of the Acura seemingly were waiting for someone in the parking lot. As of the time the driver got out to peer in the window, Phanthai was approximately ten minutes late for his appointment. Under those circumstances, it seems entirely reasonable that the driver would get out and peer inside the restaurant. While Phanthai had never said he went inside the restaurant, there was no evidence that he ever previously had been late to his meetings with Na.

Under all of these circumstances, agents reasonably could have believed that – despite discrepancies that included the color and make of Na's car and the timing of the scheduling of the meeting (two hours ahead of time versus ten minutes) – they had corroborated the guts of Phanthai's information, and the two men occupying the Acura likely were Na and his cousin. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 244-45 (1983) (“It is enough, for purposes of assessing probable cause, that corroboration through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay.”) (citation and internal punctuation omitted).

To cinch matters, agents collectively made observations in the approximately fifteen minutes in which they had the Acura under surveillance of conduct consistent with drug dealing, including the movement of the Acura around the parking lot, the brief interaction (lasting no more than a minute) between the passengers of the Acura and Honda, following which the Honda promptly departed, and the subsequent indicia that the

occupants of the Acura were continuing to wait for someone. After the Honda left, the agents filled their radio airwaves with discussion that they had observed conduct indicative of a drug transaction. That they did not see drugs, observe furtive movements, see items or money change hands, stop the Honda or even successfully record its license plate did not foreclose a reasonable conclusion, under the circumstances, that the conduct they had observed on that dark, very cold January night more than likely was drug trafficking as opposed to, say, a mere friendly exchange of greetings or the asking of directions. *See, e.g., Fiasconaro*, 315 F.3d at 36 (when Spaulding seen using cell phone and overheard stating, “the guy is on his way,” after which green Honda pulled into parking lot, Spaulding entered the Honda and was observed leaning between its front seats and conversing for approximately forty seconds, after which he departed the Honda, officers reasonably could infer that drug transaction had transpired; “Although none of the observing officers saw money or drugs change hands, it was the opinion of the officers that based on their experience, there had been a purchase of drugs by Spaulding and what had transpired was typical of a drug transaction.”).

For these reasons, agents collectively possessed probable cause to arrest the Acura’s occupants as of the time they blocked the vehicle. That being so, Thibodeau’s protective sweep of the Acura, seizure of the plastic bag and inspection of its contents constituted a valid search incident to the occupants’ arrest. *See, e.g., 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 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).¹⁵ So, too, was the search of Hansana's person in which Bosse seized the currency that Hansana now seeks to suppress. *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).

2. Probable Cause To Search Vehicle

The government alternatively argues that agents had probable cause to search the Acura for contraband and developed probable cause to arrest its occupants upon Thibodeau's retrieval of the cocaine, if not earlier. *See* Objection at 5-9. Again, I agree.

The Supreme Court has defined probable cause for a search as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. As the First Circuit recently observed:

A warrantless search of an automobile will be upheld if officers have probable cause to believe that the vehicle contains contraband.

The government bears the burden of proving the lawfulness of the search. Specifically, the government must demonstrate that law enforcement officers had a belief, reasonably arising out of circumstances known to the seizing officer, that the vehicle contained that which by law is subject to seizure and destruction. Our focus is on what the agents knew at the time they searched the car.

United States v. Lopez, No. 03-1767, slip op. at 6-7 (1st Cir. Aug. 19, 2004) (citations, internal punctuation and footnote omitted).

¹⁵ That Thibodeau did not actually know whether the Acura's occupants were under arrest when he made his protective sweep is immaterial. *See, e.g., Maryland v. Macon*, 472 U.S. 463, 470 (1985) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken.") (citations and internal quotation marks omitted).

At the time of Thibodeau's search he had (i) personally corroborated many critical details of Phanthai's statements (statements that had incriminated not only Na and Na's cousin but also Phanthai himself) and/or, via radio, heard them contemporaneously corroborated by other members of the CBI team, and (ii) personally observed conduct consistent with drug dealing. Under those circumstances, his protective sweep and inspection of the shopping bag he found lying on the floor in front of the passenger seat were lawful. *See, e.g., Fiasconaro*, 315 F.3d at 37 ("We also agree with the district court that there was an independent basis for upholding the search of the defendant's vehicle. In a case that goes back to prohibition days [*Carroll v. United States*, 267 U.S. 132, 153 (1925)], the Supreme Court held that a warrantless search of an automobile based upon probable cause to believe that the vehicle contained evidence of a crime did not contravene the Fourth Amendment's warrant requirement. . . . We have held to the same effect. The facts described above demonstrate that Officer Prough had probable cause to believe that the defendant's vehicle contained evidence of a drug transaction. Therefore, the search of the defendant's vehicle and seizure of his currency and cell phone were lawful, and the evidence admissible.") (citations omitted).

Once Thibodeau found the shopping bag in the front of the car, opened it and found within it a baggie or baggies containing a white powder believed to be cocaine – consistent with Phanthai's description of how Na packaged his drugs – agents possessed probable cause to arrest the Acura's occupants, to the extent they did not already have probable cause to do so. They then validly could search the persons of the occupants incident to arrest. *See, e.g., Meade*, 110 F.3d at 199.

B. *Miranda* Waiver

Inasmuch as I conclude that the agents had probable cause to arrest the defendants and search their vehicle and that they properly searched their persons incident to arrest, the defendants' "fruit of the

poisonous tree” argument fails. One final issue remains, however. Phonthep challenges the admissibility of his statements on an alternative basis: that as a result of a language barrier, his waiver of *Miranda* rights was not voluntary, knowing and intelligent. *See* Phonthep Motion at 5. He contends that it is apparent from speaking with him that he does not understand much English, yet no attempt was made to read *Miranda* rights in his native tongue or take any further precautions to ensure that he understood what rights he was waiving. *See id.*; *see also, e.g., United States v. Alarcon*, 95 Fed. Appx. 954, 956 (10th Cir. 2004) (“Warnings given in a language which the defendant cannot comprehend do not convey the substance of the suspect’s rights.”); *United States v. Garibay*, 143 F.3d 534, 537 (9th Cir. 1998) (“In determining whether a defendant knowingly and intelligently waived his *Miranda* rights, we consider, as one factor, any language difficulties encountered by the defendant during custodial interrogation.”).

The government bears the burden of proof by a preponderance of the evidence that a purported *Miranda* waiver was voluntary, knowing and intelligent. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 168 (1986). A waiver is considered “voluntary” if it was “the product of a free and deliberate choice rather than intimidation, coercion and deception”; it is “knowing and intelligent” if “made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon.” *United States v. Rosario-Diaz*, 202 F.3d 54, 69 (1st Cir. 2000) (citations and internal quotation marks omitted). The question whether a given waiver was voluntary, knowing and intelligent is examined with reference to “the totality of the circumstances and the facts surrounding the particular case including the background experience and conduct of the accused.” *Id.* (citation and internal quotation marks omitted).

As the First Circuit has noted, while mental history or state is pertinent to a voluntariness inquiry, “the precedents still require some degree of coercion or trickery by government agents to render a statement involuntary[.]” *United States v. Santos*, 131 F.3d 16, 19 (1st Cir. 1997); *see also, e.g., Rice v.*

Cooper, 148 F.3d 747, 750 (7th Cir. 1998) (“A confession or other admission is not deemed coerced or involuntary merely because it would not have been made had the defendant not been mentally defective or deranged. The relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers.”) (citation omitted).

The only evidence adduced at hearing regarding the *Miranda* waivers of either Phonthep or Hansana was that both men appeared to comprehend English and to understand their *Miranda* rights, which Buchanan read to each defendant slowly and clearly in English verbatim from a pre-printed DEA form, pausing to inquire after each right whether each defendant had understood it and receiving an affirmative response. While Wetherbee described Phonthep as being very quiet, there was no evidence that he (i) does in fact suffer from English-language difficulties, (ii) gave any indication that he needed a translator, or (iii) otherwise signaled that he was having difficulty understanding his rights on the night in question. Nor was there any evidence whatsoever that coercive tactics were employed to effectuate the waivers of either defendant.

Courts in similar circumstances have held the *Miranda* waiver of a non-native-English speaker valid. *See, e.g., Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989) (finding that “[e]ven though his proficiency in the English language may have been limited, it did not prevent [the defendant] from making a knowing and intelligent waiver of his constitutional rights” where the evidence showed that although the defendant spoke in broken English and occasionally lapsed into Spanish, he indicated on each occasion that he was advised of his rights that he understood them); *United States v. De Yian*, No. 94 cr. 719 (DLC), 1995 WL 422019, at *3 (S.D.N.Y. July 18, 1995) (finding that defendant had sufficient understanding of English to permit him to make a knowing waiver of his rights in view of evidence that he was able to

converse with people who spoke only English, that one was able to tell when he was having difficulty understanding a speaker, and that he gave no such indication during interview).

Accordingly, Phonthep's motion to suppress his statements on this basis should be denied.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motions 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 9th day of September, 2004.

/s/ David M. Cohen
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United States Magistrate Judge

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