

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 04-59-P-H</b>
	)	
<b>THOMAS ROBINSON,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

Thomas Robinson, charged with conspiracy to distribute and possess with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846, seeks to suppress all evidence gathered after a vehicle in which he was a passenger was stopped by agents of the federal Drug Enforcement Agency and the Maine state drug enforcement task force on April 1, 2004. Indictment (Docket No. 30); Defendant’s Motion to Suppress (“Motion”) (Docket No. 38) at [3]. An evidentiary hearing was held before me on August 26, 2004. The government called four witnesses and introduced six exhibits, which were admitted without objection. The defendant called one witness, himself, and offered no exhibits. Counsel argued orally at the end of the hearing. Post-hearing supplemental memoranda were filed on September 3 and 10, 2004. Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

**I. Proposed Findings of Fact**

On March 19, 2004 a confidential informant made a controlled buy of cocaine base in Portland, Maine from a man known to the informant only as “T.” Special Agent Paul Buchanan of the federal Drug

Enforcement Agency monitored the telephone call that arranged the buy, accompanied the informant to the vicinity of the appointed meeting place and retrieved the cocaine base after the buy and had it tested. Before the buy and after the telephone call arranging it, Buchanan drove by the appointed meeting site, where he saw a white car with Massachusetts license plates occupied by a black male with a bald or shaved head. Daniel Rousseau, another DEA agent, observed the buy, as did Steven Thibodeau, a Scarborough, Maine police officer deputized to the drug enforcement task force. Thibodeau ran the license plate of the white Nissan Altima through the Massachusetts license registration bureau and learned that the car was registered to Enterprise Rental, which informed Thibodeau that the car was leased to Henry Coren. The agents initially thought that the man in the car, who sold the cocaine base to the informant, might be Coren.

Thibodeau obtained a driver's license photograph of Coren from Massachusetts; it did not match the likeness of the individual who was in the car on March 19. He then called the Massachusetts Enterprise office again and learned that Coren had returned the white car and rented a silver Pontiac Grand Prix. The task force informed the Maine State Police that it was looking for the Pontiac.

Sheila Wetherbee, a Cumberland, Maine police office deputized to the drug enforcement task force, was told in mid-March 2004 by an informant that two black men were staying at the Coastline Inn near the Maine Mall and selling a lot of crack cocaine. She went to the Coastline Inn and asked the manager about possibly suspicious activities by two black men traveling together and using a red, white or silver car. The manager said that the only people who came to mind were Henry Coren and Thomas Robinson, who had always rented adjoining rooms and at times had lots of people in and out of their rooms. Wetherbee returned to the Coastline Inn a couple of days later because her informant insisted that she needed to look into the matter further. On this occasion, the manager said that Coren and Robinson had left the day before, driving a white or silver sedan; that they had requested rooms at opposite ends of the hotel on this occasion;

that Coren always paid in cash and on one occasion asked Robinson for money; and that she had a photocopy of Robinson's driver's license. The manager produced a copy of the driver's license for Wetherbee, who does not recall whether she took a copy with her. There is no copy in Wetherbee's files.

Wetherbee then learned, after overhearing conversations in the DEA office, that Buchanan was interested in Henry Coren. She shared her information from the Coastline Inn with Buchanan and other agents. Later in March, Thibodeau was notified that the Maine State Police had stopped the Pontiac on the Maine Turnpike and identified the driver as Gus Braggs. Thibodeau went to the scene and identified Braggs as the man who had sold cocaine base to the informant on March 19. He passed this information on to the other agents. On March 30, Buchanan learned that the Portland police had stopped the Pontiac and that Braggs was driving it. The agents decided to arrest Braggs and on April 1, 2004 went looking for the Pontiac.

On April 1, Buchanan was driving in the Maine Mall area when he observed the Pontiac in the parking lot of Friendly's restaurant. He verified that it was the Enterprise rental car for which the agents had been looking and notified Thibodeau at 2:20 p.m. that he had found the car. About five minutes later four people, one of whom was now known to Buchanan to be Braggs, came out of the restaurant and entered the car. Braggs drove the car toward downtown Portland, along Congress Street. Buchanan followed and, as the Pontiac passed the DEA office at Congress Street and Stevens Avenue, three to four other DEA vehicles took up the pursuit. It became apparent that the driver of the Pontiac had noticed the pursuit; the car zigzagged in traffic, pulled off Congress Street onto Forest Street near the Maine Medical Center and stopped in a parking lot.

At Rousseau's direction, the agents moved in at 2:45 p.m. to secure the car and arrest Braggs. Two or three of the agents drew their guns and pointed them at the inside of the car. They told the occupants to

show their hands and to step out of the car. It was raining lightly. Each of the passengers was taken out of the car, placed on the ground and handcuffed. Each was frisked or patted down. Thibodeau pulled the defendant out of the car by the defendant's wrist, while holding his gun in his other hand. He handcuffed the defendant, then helped him to his feet and patted him down. He took a knife from the defendant's pocket but did not take the defendant's wallet or cell phones. He told the defendant that he was not under arrest but would be detained. He told the defendant that Gus Braggs was being arrested. Rousseau decided to take all of the occupants of the car back to the DEA office due to the weather and the location of the stop, where several onlookers had gathered.

Wetherbee arrived on the scene as the occupants were being removed from the car. She went to the only female occupant, Stephanie Powell, patted her down, put on handcuffs, and took her back to the vehicle in which Wetherbee and her partner had arrived. The defendant was escorted to the same vehicle and Wetherbee and her partner transported the defendant and Powell to the DEA office, where all of the vehicles involved in the stop of the Pontiac arrived at 2:52 p.m. During the drive, according to the defendant, the agents asked the defendant how long he had been in Portland, what he was doing in Portland and about Braggs, to which the defendant responded that he only knew Braggs through Coren. The defendant was escorted into the building with his eyes covered. The cover was removed after he entered the building and the handcuffs were removed within ten minutes.

When the Pontiac arrived at the DEA parking lot, Thibodeau conducted an inventory search and found in the console between the front seats a key card from a Days Inn. Knowing that there was a Days Inn in the Maine Mall area, Rousseau and Agent Tully took the card and went to the Days Inn, where the manager confirmed that Coren and Powell were registered, in rooms 145 and 147. Rousseau called Buchanan and asked him to obtain consent to search the rooms.

Powell and the defendant had been placed in an interview room that was approximately eight by eight feet, with a window and two doors. The door to the corridor was unlocked. Wetherbee was present when Rousseau asked Powell for consent to search the rooms. The defendant was asked if he had rented a room at the Days Inn and said “no.” Powell gave verbal and written consent. The written consent was faxed to the hotel and Rousseau and Tully were allowed to enter the rooms. The key card did not open the door to room 147; it did open the door to room 145, in which the agents found, on top of a bed, a backpack that contained plastic bags containing what Rousseau believed to be cocaine base. Rousseau called Buchanan and told him to place all of the detainees under arrest. The substance later tested positive as cocaine base in field and laboratory tests.

At a time between 3:00 and 3:10 p.m. Buchanan placed the defendant in handcuffs and informed him that he was under arrest. According to the defendant, he was given *Miranda* warnings<sup>1</sup> at this time. Before then, but after giving consent to the search, Powell asked to use the bathroom and while there told Wetherbee that she had made the request in order to get away from the defendant so that she could tell Wetherbee that the defendant was staying in room 145, which Powell had rented. Wetherbee stopped Powell and told her that they would talk about that later. About five minutes later, after she too had been given *Miranda* warnings, Powell said that she had rented room 145 at the defendant’s request and that he had been staying with Braggs in that room, from which she suspected they were selling drugs. She said that they would receive a lot of telephone calls and, following each call, one of them would leave for a short period of time. On one occasion, she said, she walked out of her room and saw Braggs, who began to speak to her, whereupon small bags fell out of his mouth.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

According to the defendant, while he was in the interview room one of his cell phones kept ringing. He was allowed to answer it but directed not to tell the caller where he was. The agents kept asking him where he was staying. According to Buchanan, he read *Miranda* warnings to the defendant at around 4:45 p.m. and questioned him for 20-30 minutes. The defendant was not given any *Miranda* warnings before Buchanan did so. According to the defendant, Buchanan had the backpack with him at this time and asked the defendant and Powell whose it was. The defendant testified that neither he nor Powell answered that question. The defendant also testified that when everyone in the room then looked at him, he said: “If you want it to be mine, then it’s mine.”

The defendant denied that he was staying at the Days Inn at the time of these events.

## **II. Discussion**

With respect to the backpack and its contents — the only evidence apparently taken from Room 145 at the Days Inn — the defendant contends that he had a reasonable expectation of privacy in the room and its contents, so that the warrantless search, to which he had not consented, violated the Fourth Amendment. Motion at [3]. However, this position is contradicted by his own testimony in which he denied that he was staying in that room. The undisputed evidence is that the agents had the consent of Powell, in whose name the room was registered, to search the room. Government Exhibits 4 & 6. “[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises . . . sought to be inspected.” *United States v. Matlock*, 415 U.S. 164, 171 (1974). “Third party consent remains valid even when the defendant specifically objects to it.” *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992). Here, the defendant cannot establish that he had a legitimate expectation of privacy in

Room 145, the basic element of standing to challenge a search, *United States v. Vargas*, 633 F.2d 891, 899 (1st Cir. 1980), when he himself has denied that he was staying in that room, *United States v. Baumwald*, 720 F. Supp. 226, 232 (D. Me. 1989); *United States v. Daniel*, 230 F.3d 1354 (Table), 2000 WL 1359665 (4th Cir. 2002), at \*\*2.

In his supplemental memorandum, the defendant contends that, if the agents were justified in relying on Powell's consent to search Room 145, which was registered in her name, they nonetheless could not open the backpack found in that room without first obtaining a warrant, citing *United States v. Karo*, 468 U.S. 705, 723-24 (1984), and that, because Powell told Wetherbee that the defendant had been using Room 145, Wetherbee's knowledge barred the agents from searching the room. Suppression Memorandum (Docket No. 76) at [2]-[3]. The second contention fails because the evidence establishes that Powell did not convey this information to Wetherbee until the search of Room 145 was already underway. Even if Wetherbee's knowledge must be imputed to her colleagues several miles away at the moment the information was imparted by Powell, and even if this information overrides the defendant's sworn testimony that he was not using the room — two questions that need not be decided under the circumstances — the information was not made available before the search of the backpack took place. With respect to the first contention, the defendant cites *dicta* from a separate opinion, concurring in part in *Karo*, 468 U.S. at 723-24, which has no binding force. In addition, the issue in that case was whether government agents could rely on information gleaned from a beeper placed surreptitiously in a container subsequently carried into a defendant's home by an unsuspecting guest, *id.*, a factual situation easily distinguishable from the one at hand. While there is case law holding that a third party who has authority to consent to the search of a room or location within a building may not necessarily have authority to consent to the search of closed containers in those rooms or locations over which he or she had no control or

authority, *e.g.*, *United States v. Tucker*, 57 F.Supp.2d 503, 514-15 (W.D. Tenn. 1999), and cases cited therein, those cases involved closed containers in which the consenting individual clearly disclaimed ownership interest, of which the defendant claimed ownership or which the evidence established that the defendant had placed in the room or other location. None of those factual situations is present here, where the defendant denied that he used the room and has not asserted any ownership interest in the backpack. The defendant's statement to Buchanan and other DEA agents about the backpack after it was found and searched and after Powell and all agents in the room turned to and looked at him when he and Powell were asked whose backpack it was — "If you want it to be mine, then it's mine." — cannot reasonably be construed as an assertion of ownership.

The remainder of the defendant's motion apparently concerns statements that he may have made to the agents, most of which were not specified at the hearing. The defendant contends that he was under arrest from the moment the car was stopped, and that the agents lacked probable cause to arrest him at that time. These contentions lead to his conclusions that the arrest was illegal, invalidating any evidence that may arise from anything he said thereafter and that anything he said before the *Miranda* warning was given must be suppressed.

Law enforcement officers are permitted to stop and briefly detain a person for investigative purposes. *United States v. Trueber*, 238 F.3d 79, 91-92 (1st Cir. 2001). In evaluating the reasonableness of the agents' conduct toward the defendant in this case, the court must

first determine whether the officer[s'] actions were justified at their inception, and if so, whether the actions undertaken by the officer[s] following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officers during the stop.

*Id.* at 92 (citation and internal punctuation omitted). In this case, the agents had probable cause to stop and arrest Braggs, the driver of the car in which the defendant was riding, and the defendant does not argue otherwise. As to the other occupants of the car, the agents were entitled to detain them for investigative purposes; from all that appears, that is what happened here. Even if the defendant subsequently was subjected to restraints comparable to those associated with a formal arrest at some time during the 25 to 30 minutes between the time the Pontiac was stopped and the time when Buchanan told the defendant that he was under arrest and placed handcuffs on the defendant for a second time, at most he was entitled to a *Miranda* warning before being questioned. *Id.* at 93.

In assessing whether the defendant was subjected to a *de facto* arrest before he was formally arrested at the DEA office, the court must consider all of the circumstances surrounding the interrogation objectively; the test is not the subjective beliefs of the defendant but rather how a reasonable person in the defendant's position would have understood the situation. *Id.*

Relevant circumstances include, among other inquiries, 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.

*Id.* (citation and internal quotation marks omitted). Here, the defendant was questioned, if at all, only in the Jeep in which he was transported to the DEA office and in an interrogation room at the DEA office — not familiar surroundings but not threatening ones either, given the facts that he was told that he was not under arrest, that the handcuffs were removed when he reached the interview room, and that he was with Powell during almost all of the time he spent in the interview room before his formal arrest. There were five to six agents at the scene of the stop, but no more than two with Powell and the defendant at any time during which pre-*Miranda* questioning could have taken place. The defendant was handcuffed for most of the

seven minutes between the stop and his arrival at the DEA office, but then the handcuffs were removed and he was told that he could not leave. The questioning could not have taken more than seven minutes in the Jeep and eighteen minutes in the interview room — the total time from the arrival at the DEA office to the formal arrest. By the defendant’s own testimony, any questioning took much less time than that, and none could reasonably be characterized as seeking incriminating information. *Compare United States v. Marenghi*, 896 F. Supp. 207, 215 (D. Me. 1995) (impermissible questions directed at inducing defendant to state whether she was carrying drugs). The defendant testified that the two agents transporting him and Powell to the DEA office asked him how long he had been in Portland, what he was doing in Portland and why he had two cell phones.<sup>2</sup> At the DEA office, according to the defendant, one of his cell phones kept ringing and a female agent told him to answer it but directed him not to tell the caller where he was; he was again asked how long he had been in Portland, what he was doing in Portland and “about Braggs;” and he was asked where he was staying. All of this occurred, according to the defendant, before he was formally arrested and received a *Miranda* warning. He did not testify about his responses to any of these questions, except that he told the agents he only knew Braggs through Coren.

The fact that an agent had his gun drawn and, according to the defendant, held down at his side while he pulled the defendant out of the Pontiac by the wrist, does not turn the investigatory stop of the defendant into a *de facto* arrest. *Id.* at 94. The drawing of the gun was reasonably related to the agents’ knowledge that Braggs was in the car and their reasonable belief that Braggs was engaged in drug trafficking. *Id.* Detentions up to 50 minutes in length do not create *de facto* arrests where the officers involved are diligently pursuing an investigation that would dispel their suspicions concerning the defendant,

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<sup>2</sup> Wetherbee testified that she did not question the defendant during the transport.

*United States v. Owens*, 167 F.3d 739, 749 (1st Cir. 1999), as was the case here. The detention in this case, while somewhat more restrictive than that involved in *Trueber*, occupied significantly less time and fewer questions; on balance, I find it indistinguishable from the finding in that case that the officers' conduct was justified at its inception and reasonably related in scope to the circumstances of the initial stop. 238 F.3d at 83-85 (describing traffic stop in which defendant was passenger, defendant consented to return to hotel room and to search of luggage, and defendant was questioned over period of approximately 30 minutes before being arrested and given *Miranda* warnings), 95 (reversing order suppressing statements). The factual circumstances are distinguishable from those present in *United States v. Acosta-Colon*, 157 F.3d 9, 15-16 (1st Cir. 1998), on which the defendant relies, Motion at [3]. In that case, the defendant was stopped when attempting to board a plane, handcuffed and taken to a customs enclosure area (causing him to miss his flight), patted down for weapons after which the handcuffs were removed, placed alone in an interrogation room for 15 minutes and arrested after he was observed trying to eat two pieces of paper which, upon forcible extraction, proved to be baggage claim tickets. *Id.* at 12. The First Circuit held that the government had not presented any fact or circumstance that made relocating the defendant to the "detention room" reasonably necessary to effectuate a safe investigation but that the evidence instead showed that the agents involved had planned from the outset to bring the defendant to the room for questioning rather than remaining at the gate while investigating their suspicions, and that causing the defendant to miss his flight and using handcuffs were also factors. *Id.* at 15, 17-18. Therefore, the court concluded, the stop was a *de facto* arrest rather than an investigatory stop. Here, Rousseau testified that the four people in the Pontiac were moved to the nearby DEA office, out of the rain and away from curious onlookers, for questioning under more controlled circumstances. The defendant was not caused to miss a planned transportation connection, which would have made his detention much longer than 35 minutes in

practical terms. The circumstances of the stop — four occupants of a vehicle reasonably suspected of being used in drug trafficking and driven by a man whom two of the agents had observed engage in drug trafficking — justified the brief use of handcuffs. Unlike the defendant in *Acosta-Colon*, *id.* at 19 n.10, none of the occupants of the Pontiac had recently passed successfully through a metal detector. Here, unlike the situation in *Acosta-Colon*, *id.* at 20-21, the government has provided evidence of the reasonable investigatory steps that were being undertaken during the detention period. Even in that case, the First Circuit suggested that statements made by the defendant after he had been given *Miranda* warnings might be admissible. *Id.* at 22. Here, the defendant has offered no evidence that would allow this court reasonably to conclude that any statements he made during the period after the stop and before he was given *Miranda* warnings were in any way incriminating.<sup>3</sup>

Having determined that the events before the defendant’s formal arrest did not constitute a *de facto* arrest, I now turn briefly to the question whether the nature of the detention nonetheless required that the *Miranda* warnings be given at some point before the formal arrest. *United States v. Quinn*, 815 F.2d 153, 160 (1st Cir. 1987). As was the case in *Quinn*, the defendant was detained but was told that he was not under arrest and “pressures that sufficiently impaired the free exercise of his privilege against self-incrimination were not imposed.” *Id.* at 161. Particularly in the absence of any indication from the defendant that he made any incriminating statements to the agents before he was given *Miranda* warnings, I have no difficulty in concluding that no earlier warning was required.

### III. Conclusion

For the foregoing reasons, I recommend that the motion to suppress be **DENIED**.

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<sup>3</sup> The defendant testified that his statement about ownership of the backpack was made after he had been read the (continued on next page)

**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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 13th day of September, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Defendant(s)**

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*Miranda* warnings which he did not suggest that he did not understand.

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