

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 06-46-P-H
)	
PETER WEYMOUTH,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Peter Weymouth, charged with knowing possession of an unregistered firearm with a barrel less than eighteen inches and, as modified, an overall length less than twenty-six inches (to wit, an Izhevsky Mechanical Works 12-gauge shotgun, model IJ-58M, serial number K27042), in violation of 26 U.S.C. §§ 5861(d), 5841, 5845(a) and (d) and 5871, *see* Indictment (Docket No. 1), seeks to suppress the shotgun described in the Indictment. *See* Motion To Suppress (Docket No. 17).¹ An evidentiary hearing was held before me on November 3, 2006 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

York County Sheriff's Department ("York Sheriff's") deputies Kevin Ledoux and Travis Jones were on midnight-shift patrol duty on January 19, 2005 when, at about 2:30 a.m., they received word from their dispatcher that an anonymous caller had reported that Peter Weymouth, who was the subject of an

¹ The defendant also moved to suppress statements made following his arrest, *see* Motion To Suppress; however, at (continued on next page)

outstanding arrest warrant, was staying at a house at 40 Wilfred Drive in Lebanon, Maine. The caller advised that Weymouth (i) usually slept in the front room of the Wilfred Drive residence so that he could observe people approaching the house, (ii) had been known to flee out the back door, (iii) was usually armed and (iv) was planning to leave Maine permanently that morning for New York.

Ledoux and Jones, who were not familiar with Weymouth, confirmed through the dispatcher and a computer in their cruiser that he was the subject of a warrant for his arrest on charges of burglary and theft. Almost immediately after Ledoux spoke to the dispatcher, he received a cell-phone call from Loren Conger, a former York Sheriff's detective, who advised Ledoux that the theft charge against Weymouth was firearms-related. Ledoux relayed this information to Jones, checked in with his lieutenant and enlisted the aid of a Maine State Police trooper, Dan Worcester, and a Sanford Police Department officer, Scott Foisey, in executing the arrest warrant. Within an hour after Ledoux and Jones had fielded the initial call from the dispatcher they and their two colleagues arrived on foot at 40 Wilfred Drive, having parked their vehicles further up the road to avoid detection.

Ledoux and Foisey approached the front of the residence – a small, one-story camp with a pickup truck in the driveway – while Worcester and Jones approached the back. Ledoux observed a light on in the front room, where the caller had indicated Weymouth usually stayed. The officers made several fruitless attempts to contact the camp's occupants, including phone calls and a ruse of announcing that the pickup truck was about to be towed. Through the back wall, Jones heard someone moving inside the camp and distinctly heard someone say, "Hey, Pete." He advised his fellow officers that he believed there were two people inside, one of whom seemed to be making his way toward the front door.

hearing, his counsel withdrew that portion of the motion.

Ledoux and Foisey knocked on the front door, and an unknown male opened it. They immediately placed him on the ground and handcuffed him. The male identified himself as Franklin Locke. By this time Jones and Worcester had rejoined Ledoux and Foisey at the front of the house. Foisey and Worcester took charge of Locke while Ledoux, followed by Jones, entered the camp, stepping through the front entrance into the kitchen. Ledoux and Jones saw a black shotgun case resting against a kitchen wall, heightening their concern for their own safety inasmuch as they believed at least one person remained inside. They observed a small alcove and what appeared to be two additional room entrances covered by burlap hung from floor to ceiling, obscuring their view of the rooms within. They entered the smaller burlap-covered room, an approximately six-foot by eight-foot back bedroom, where they saw a cot and a rifle. They made their way to the larger burlap-covered room, an approximately twelve-foot by twelve-foot living room, in which they observed a male – the defendant – lying on a futon bed, apparently asleep, a shotgun resting against the wall within his arm’s reach.

The officers ordered the defendant to show his hands. He eventually opened his eyes and complied. They handcuffed and searched him, and he identified himself as Peter Weymouth, producing a State of Maine driver’s license. He asked why he was being arrested, and Ledoux explained that he was under arrest on an outstanding warrant. With no further ado Ledoux escorted the defendant out of the camp to his waiting cruiser, which either Worcester or Foisey had driven up into the driveway. It was very cold outside that night – too cold to have detained the defendant outside without placing him in a vehicle. As soon as Ledoux and Jones found Weymouth, they were satisfied they had located everyone who might have been present at the camp. They considered the protective sweep to have been completed.

No more than a minute after the defendant had been handcuffed – and just after Ledoux had removed him from the room – Jones began to secure the shotgun he and Ledoux had observed leaning

against the wall near the futon. As he did so, he saw what appeared to be the barrel of a rifle or shotgun protruding from under the futon where the defendant had been sleeping. He finished securing the first shotgun – making sure the chamber was open and unloaded – and then went back for the second one. He lifted up the futon mattress, whereupon he could see the entirety of the weapon, recognizing it as a sawed-off shotgun with double chambers side by side.² The sawed-off shotgun would have been directly under the defendant’s head while he lay on the futon. Jones seized that shotgun.³

After Ledoux placed the defendant in his cruiser, still handcuffed, he locked him inside and reentered the camp. He was gone only about five minutes. At that point, as far as Ledoux was concerned, the defendant was secure. As soon as Ledoux returned, Jones showed him the sawed-off shotgun. Ledoux had not observed that firearm while he had been in the living room arresting the defendant. In all, officers removed seven or eight firearms, mostly shotguns, from the camp.

Shortly after Ledoux and Jones had entered the camp to begin their protective sweep, Foisey and Worcester had brought Locke inside. They sat him down at the kitchen table and stood guard next to him. After the defendant was secured in handcuffs, officers removed Locke’s handcuffs. They had determined Locke was not the person for whom they were looking, and they had no reason to believe he was a dangerous individual. Nonetheless, Locke remained seated in the kitchen with officers standing guard near him and was not at that point free to roam where he pleased.

² In direct examination, in response to the question when Jones actually saw the sawed-off shotgun, he responded that he saw it as he was securing the other firearm, although he had to look under the futon to fully see the entire weapon.

³ At hearing, the defendant testified that he had wrapped the sawed-off shotgun in a blanket or quilt and that he was certain the blanket was completely covering the gun because he had just rewrapped it earlier that day. Nonetheless, the defendant admitted that he did not recall having mentioned that the shotgun had been covered in a blanket or quilt when he gave a detailed statement to police at 1 p.m. on the day of his arrest. *See also* Gov’t Exh. 3A at 41 (transcript of interview of defendant on January 19, 2005). Jones testified unequivocally that the sawed-off shotgun was not wrapped in a blanket or quilt when he found it. I credit Jones’ testimony.

II. Discussion

The defendant moves to suppress the sawed-off shotgun, arguing that it is the product of an illegal search – not justifiable as either a search incident to his arrest or part of a protective sweep – inasmuch as he already had been removed from the dwelling in handcuffs at the time it was found. *See* Memorandum in Support of Motion To Suppress (Docket No. 18) at 1-2. At hearing, counsel for the government argued that the sawed-off shotgun was discovered not as a result of a search but rather was in plain view. Alternatively, he contended, even if the shotgun was found following a search, the search was lawfully undertaken as a search incident to arrest or as part of a protective sweep.

The government bears the burden of proving the lawfulness of warrantless searches and seizures. *See, e.g., United States v. Ramos-Morales*, 981 F.2d 625, 628 (1st Cir. 1992). For the reasons that follow, I conclude that the government carries its burden of showing that the showed-off shotgun properly was seized after its discovery in plain view. I need not, and do not, consider the government’s alternative arguments.

“It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.” *United States v. Meada*, 408 F.3d 14, 23 (1st Cir. 2005) (citation and internal quotation marks omitted). Nonetheless, at hearing, defense counsel argued that even if one accepts Jones’ testimony concerning the manner in which he found the sawed-off shotgun, Jones’ observations at most gave him probable cause to seek a warrant to search under the futon for a gun or contraband, rather than justifying the immediate seizure of the object, because Jones was not sure exactly what he saw and needed to lift the mattress to confirm his suspicions.⁴

⁴ Defense counsel did not suggest that Jones had no right to be where he was when he spied the object under the futon. (*continued on next page*)

“[P]olice officers may seize an object in ‘plain view’ without a warrant if they have probable cause to believe it is contraband without conducting some further search of the object, i.e., if its incriminating character is immediately apparent.” *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (citation and internal quotation marks omitted); *see also, e.g., United States v. Friel*, Criminal No. 06-25-P-H, 2006 WL 2536272, at *4 (D. Me. Sept. 5, 2006) (“[O]nce law enforcement reached the head of defendant’s bed pursuant to a search warrant that included the entire residence, they were entitled to seize the weapon in ‘plain view,’ because given the defendant’s status as a felon, it was illegal for him to possess the firearm and, therefore, it was reasonable for them to believe that the gun was evidence of a crime.”).

For purposes of the plain-view doctrine, an officer need not necessarily observe an object in its entirety for its incriminating nature to be immediately apparent. *See, e.g., United States v. Clarke*, No. 97-1238, 1997 WL 829271, at *1-*2 (2d Cir. Dec. 8, 1997) (district court’s finding that firearm was in plain view was not clearly erroneous in circumstances in which officer had observed barrel of shotgun protruding from bed between mattress and box spring); *United States v. Weatherspoon*, 82 F.3d 697, 699 (6th Cir. 1996) (plain-view requirements satisfied in case in which officer had seen barrel of gun sticking out from under car seat); *United States v. Hatten*, 68 F.3d 257, 261 (8th Cir. 1995) (plain-view requirements satisfied in case in which officer had seen barrel of gun sticking out from beneath car seat).

Similarly, in this case, as Jones was securing the weapon seen leaning up against the wall, he saw, without conducting any search, the barrel of a weapon protruding from the futon. While he was not sure whether it was a rifle or shotgun, and did not know then it was a sawed-off shotgun, he reasonably believed it was a firearm. He in turn had probable cause to seize the firearm inasmuch as he knew the defendant had

There can be no question that Jones, who a moment before had helped to effectuate the defendant’s arrest pursuant to a
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just been arrested on charges relating to theft of firearms. *See United States v. Hamie*, 165 F.3d 80, 83-84 (1st Cir. 1999) (noting that, for purposes of plain-view doctrine, “[t]he term ‘immediately apparent’ has been defined as sufficient to constitute probable cause to believe it is evidence of criminal activity. This standard requires there must be enough facts for a reasonable person to believe that the items in plain view may be contraband or evidence of a crime. A practical, nontechnical probability that incriminating evidence is involved is all that is required.”) (citations and internal quotation marks omitted); *Hatten*, 68 F.3d at 261 (observing that, for plain-view purposes, “probable cause demands not that an officer be sure or certain but only that the facts available to a reasonably cautious man would warrant a belief that certain items may be contraband or stolen property or useful as evidence of a crime”; stating: “Hidden guns, even badly hidden guns, are by their nature incriminating.”) (citations and internal punctuation omitted).

III. Conclusion

For the foregoing reasons, I recommend that the Motion To Suppress 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 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 6th day of November, 2006.

warrant, was lawfully on the premises at that time.

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

Defendant

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