

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
 )  
v. ) Crim. No.04-78-B-W  
 )  
JOHN EDWARD WALSTON, )  
 )  
Defendant )

**RECOMMENDED DECISION  
ON MOTION TO SUPPRESS (Docket No. 32)**

John Walston has moved to suppress a .22 caliber Rohm revolver seized by the police from the glove compartment of his wife's Volvo station wagon on the grounds that the search violated the Fourth Amendment under United States v. Belton, 453 U.S. 454 (1981), and United States v. Strahan, 984 F.2d 155 (6th Cir. 1993). Walston is charged with firearms violations under 18 U.S.C. § 922 (a)(6) and (g)(9), provision of false information on a firearms application and possession of a firearm after having been convicted of a crime of domestic violence. I held an evidentiary hearing on this motion on March 11, 2005. I now **RECOMMEND** that the court adopt the following proposed findings of fact and **DENY** the motion to suppress.

***Proposed Findings of Fact***

Arthur Roy is the current chief of the Dexter, Maine, Police Department. Before coming to Maine Roy worked for twenty-two years in law enforcement in Florida. On September 24, 2005, he was sitting in a marked Dexter police cruiser in the parking lot of the Catholic church in Dexter. An anonymous individual pulled up beside him in a pickup truck and told the chief that he recognized a man nearby as someone for whom an

active warrant of arrest was pending. The pickup truck driver indicated the person's name was John Walston. The informant further indicated that Walston was working as a flagger for the paving crew on Route 7 in Dexter and that he was the only flagger standing at the southbound side of the worksite.

Chief Roy made contact with the Penobscot County Sheriff's Office dispatch and confirmed that there was an active warrant for a John Walston. He also learned that Walston's right to operate a motor vehicle was under suspension. Roy proceeded to the location of the paving crew. Upon first encountering the crew he attempted to locate the foreman because he anticipated he would be arresting the flagger and there would be safety concerns regarding the traffic. He was unable to locate the foreman but proceeded southbound down Route 7 through the construction area until he came to the end of the construction where he found the flagger. He pulled alongside the man and asked him his name. The flagger identified himself as John Walston.

The area where Chief Roy stopped was a paved asphalt highway in a relatively open area. The Chief had pulled his cruiser onto the dirt shoulder. The only other vehicle in the area was a 1987 grey Volvo station wagon with Connecticut plates parked approximately twenty feet in front of him on the shoulder of the road. There was a large dog in the station wagon.

The Chief informed Walston of the warrant and placed him under arrest. He conducted a pat-down search and located a switchblade and marijuana in a fanny pack on Walston's person. Chief Roy placed Walston in handcuffs and put him in the front seat of his cruiser secured by a seat belt. Chief Roy's cruiser does not have a secure back seat and he therefore prefers to transport prisoners in the front seat of his cruiser where he can

see them. After he placed Walston in the front seat he took the construction crew walkie-talkie and used it to make contact with the crew in order to get a flagger there to take Walston's place. In a short time a female flagger arrived on the scene.

Walston and the Chief had a brief conversation<sup>1</sup> about the Volvo station wagon. Walston said the vehicle belonged to his wife and that he had ridden down to the job site from Jackman in it that day. He identified his brother as the operator of the vehicle, said his brother also worked for the construction crew, and told the officer that his brother was not working that day and had gone off somewhere to do something. Knowing that Walston's right to operate was under suspension, Chief Roy had doubts about the "brother" story. He checked the Connecticut registration and confirmed that the vehicle was registered to a woman, although the woman's last name was not the same as Walston's. Walston and Chief Roy also had a brief discussion about the dog and what sort of arrangements needed to be made vis-à-vis the dog.

Chief Roy then determined that he would have to secure the vehicle because there was no one on the scene to take control of it. The vehicle was either not locked or Walston provided the keys. Chief Roy walked over to the vehicle to secure it in anticipation of its impoundment by the police. He looked into the glove compartment and found a small revolver. At that point Chief Roy's safety concerns became more heightened and he discontinued his vehicle search and called for back up. Walston saw that Roy had the gun and told him that it belonged to his wife. When Sgt. Emerson, the back up officer, arrived on the scene Roy returned to the vehicle and completed his search. Nothing else of any evidentiary significance was found.

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<sup>1</sup> Although this un-Mirandized custodial conversation is mentioned in passing in defendant's reply (Docket No. 45 at 2), there is no motion seeking to suppress any of these statements.

Once Sgt. Emerson arrived at the scene the officers decided the vehicle was far enough off the road that it could be left at the scene rather than towed. Chief Roy left with the defendant and Sgt. Emerson stood by the vehicle to await the arrival of the animal control officer. The animal control officer did not arrive in short order so Sgt. Emerson took the dog and returned to the police station where the dog remained until later that evening when the animal control officer took it to a veterinarian's office in Dover Foxcroft. Sometime the following day Walston's wife arrived from Jackman and claimed the vehicle and retrieved the dog.

The Dexter police department has a formal written inventory procedure that applies to motor vehicles which come under their custody or control. In this case Chief Roy prepared a brief one-paragraph police report that described the arrest and the seizure of the firearm, but made no mention of the dog. He never prepared any formal inventory report regarding the contents of the vehicle.

### **Discussion**

The Government justifies this warrantless search of a motor vehicle as either a search incident to arrest under Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127 (2004), or as a valid inventory search under Colorado v. Bertine, 479 U.S. 367 (1987).<sup>2</sup> (Gov't Response, Docket No. 37, at 4-8.) I agree with the Government on the first ground.

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<sup>2</sup> The Government also makes the argument that Walston has failed to establish that he possessed a legitimate expectation of privacy in the vehicle because he was not the owner of the vehicle and denied being the operator of the vehicle. Rakas v. Illinois, 439 U.S. 128, 131 (1978) . However, I am satisfied that the nexus between Walston and the vehicle was sufficiently established in order to find that Walston met his burden of establishing a legitimate expectation of privacy in the subject motor vehicle. Even if he did not operate the vehicle that day, his possession of the keys and the presence of the dog establishes that the car was his "base of operation" while he was working as a flagger.

Walston argues that this case is distinguishable from the plurality opinion in Thornton because, according to Walston, the Thornton holding that allows an officer to search a vehicle's passenger compartment as a contemporaneous incident of arrest, is limited by its facts to those situations in which the officer has actually seen the defendant inside the subject vehicle or, alternatively, because there was "no connection" between the warrant-based arrest and the vehicle. (Motion to Suppress, Docket No. 32, at 2.) But the Thornton plurality opinion makes clear that the rule of New York v. Belton, 453 U.S. 454 (1981), allowing a warrantless search of a vehicle's passenger compartment following a valid arrest of a 'recent' occupant, "may turn on [the arrestee's] temporal or spatial relationship to the car at the time of the arrest and search." Thornton, 124 S. Ct. at 2131.

In this case the exact temporal relationship to the interior passenger compartment is unknown because Chief Roy did not know when Walston last accessed the interior of the station wagon. But Walston's general, temporal relationship to the vehicle could not be clearer. He arrived at work that morning in the vehicle and had been in view of the vehicle and able to access it for the entire time he was there. The facts of this case also establish an extremely close spatial relationship between the defendant and the vehicle (approximately twenty feet). Furthermore, Walston was not working inside a building with his vehicle parked in an outdoor parking lot twenty feet away. Walston's job as a road flagger, coupled with the presence of the dog inside the vehicle, makes it likely that he would enter the passenger compartment frequently during the course of his shift, having chosen to park (or have the vehicle parked) right beside his work space on the shoulder of the road. The Government's description of the motor vehicle as Walston's

"base of operation" (Gov't. Resp. at 6) is accurate, in my view, and brings these facts squarely within the plurality holding of Thornton.

Walston takes comfort with the concurring Thornton justices, one of whom expressed her dissatisfaction with the state of the law in this area because "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel v. California, 395 U.S. 752 (1969)." Thornton, 124 S. Ct. at 2133 (O'Connor, J., concurring in part). The twin rationales refer to the Chimel exceptions applicable to searches within an arrestee's immediate control for purposes of ensuring officer security or preventing the removal or destruction of evidence. But the plain truth is that the New York v. Belton rule, with its emphasis on a "bright-line" regarding the search of motor vehicle passenger compartments incident to arrest, does promote a police entitlement to wholesale rummaging without any real justification.<sup>3</sup> See Thornton, 124 S. Ct. at 2135 (Scalia, J., concurring) (discussing the use to which lower courts have put the Belton rule).

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<sup>3</sup> Walston argues that the alternative rule set forth in Justice Scalia's concurrence is a better formulated rule. According to Justice Scalia Belton searches are justified not by the Chimel protection of the officer/prevention of the destruction of evidence rationales, but simply because the car "might contain evidence relevant to the crime for which he was arrested." Thornton, 124 S. Ct. at 2135 (Scalia, J. concurring). Walston argues that since he was arrested on an unrelated arrest warrant, there is no reasonable likelihood that the car would contain evidence of the crime of his arrest. That argument presupposes that Justice Scalia's rule is based upon a reasonable likelihood standard. The rule, however, would appear to be simply grounded on a generalized "interest in gathering evidence." Id. at 2136. Of course, in Walston's case the pat down search of his person produced a dangerous weapon and a controlled substance. The standards for Justice Scalia's proposed rule have not been fully developed. However, it would appear that the discovery of the contraband in Walston's fanny pack would independently justify the search of the vehicle under either the approach advocated in the lead Thornton opinion or the approach suggested by Justice Scalia.

For the record, Walston's citation of the Sixth Circuit's opinion in Strahan does not assist him. The Sixth Circuit has abrogated the holding of Strahan in light of Thornton. See United States v. Herndon, 393 F.3d 665, 667-78 (2005) (quoting Thornton, 124 S. Ct. at 2132: "So long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle pursuant to the arrest.").

The Government also justifies this search as an inventory search. Warrantless inventory searches must be conducted according to standardized procedures. United States v. Hernandez-Albino, 177 F. 3d 33, 42 (1st Cir. 1999). Dexter's standardized inventory policy applies to all property taken into police custody or subject to police control. (Inventory Policy, ¶ I). The portion of the inventory procedure applicable to this situation was found at ¶ VI. It reads as follows:

VI. Owner/Operator Arrested/Incapacitated.

A. Where the owner/operator in possession of a vehicle is arrested for a traffic violation or for some other offense or is physically unable to continue operating his vehicle, and the vehicle is not required as evidence and need not be impounded for any other reason, the investigating officer will adhere to the following procedures:

1. Advise the owner/operator that he may, if he so desires, release the vehicle to a licensed driver who is willing to assume full responsibility for the vehicle and all property contained therein.
2. Advise the owner/operator that he may, if he desires, secure the vehicle and allow it to remain at the scene on the conditions that it will be parked in an unrestricted parking area or other safe location and the owner/operator agrees to assume full responsibility for the vehicle and all property left therein. The owner/operator shall also be advised that if the vehicle is left unattended and becomes a traffic hazard, it may be towed by a department-dispatched tow vehicle.
- 3 . If the owner/operator chooses not to release the vehicle to a third party, or is not competent or is otherwise unable to make disposition of his vehicle, or will not agree to secure his vehicle in an unrestricted parking area or other safe location and to assume full responsibility for the vehicle and property left therein, the vehicle shall be removed by a department-dispatched tow vehicle.

As there was no third party in attendance to whom the vehicle could have been released, it appears to me that the standardized procedure would have required the officer to inform the defendant of option # 2. Clearly option # 2 was the final option elected in this case

because the vehicle was never fully inventoried nor was it ever towed or taken to any secured storage place.

Had this been an inventory pursuant to the standardized policy, the Chief would have prepared a written inventory and recorded the presence of items such as the spare tire and other vehicle equipment. Inventory Policy ¶ III, sub ¶ 4 ("The spare tire and other vehicle equipment do not have to be removed if the officer records their presence on the written inventory."). While Chief Roy may have had a fleeting thought about towing the vehicle at the time he made the initial arrest, that thought never came to fruition. In my mind justifying this search based upon a factual finding that the chief followed the standardized inventory search procedure would be unsustainable. What appears to have actually happened is that he and Sergeant Emerson cobbled together an ad hoc practical solution to the situation they confronted. That solution did not adhere to the department's standardized inventory procedure.

### **Conclusion**

Based upon the foregoing, I recommend that the Motion to Suppress (Docket No. 32) 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 of 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.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated: March 14, 2005

**Defendant**

**JOHN EDWARD WALSTON (1)**

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**Pending Counts**

IMPORTING/MANUFACTURING  
FIREARMS - FALSE  
STATEMENT ON FIREARMS  
APPLICATION IN VIOLATION  
OF TITLE 18, SECTION  
922(a)(6)and 924(a)(2)  
(1)

18:922A.F - FALSE STATEMENT  
IN ATTEMPTED ACQUISITION  
OF A FIREARM - 18:922(a)(6) and  
924(a)(2)  
(1s)

18:922A.F - FALSE STATEMENT  
ON FIREARMS TRANSACTION  
RECORD - 18:922(a)(6) and  
924(a)(2)  
(1ss)

18:922G.F - POSSESSION OF  
FIREARMS BY A PERSON  
PREVIOUSLY CONVICTED OF  
A MISDEMEANOR CRIME OF  
DOMESTIC VIOLENCE  
18:922(g)(9)  
(2s-4s)

18:922G.F - POSSESSION OF

**Disposition**

FIRARM BY A PERSON  
PREVIOUSLY CONVICTED OF  
A MISDEMEANOR CRIME OF  
DOMESTIC VIOLENCE -

18:922(g)(9)

(2ss)

18:922G.F - POSSESSION OF  
FIREARM BY A PERSON  
PREVIOUSLY CONVICTED OF  
A MISDEMEANOR CRIME OF  
DOMESTIC VIOLENCE -

18:922(g)(9)

(3ss)

18:922G.F - POSSESSION OF A  
FIREARM BY A PERSON  
PREVIOUSLY CONVICTED OF  
A MISDEMEANOR CRIME OF  
DOMESTIC VIOLENCE -

18:922(g)(9)

(4ss)

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

None

**Disposition**

**Highest Offense Level  
(Terminated)**

None

**Complaints**

18:922A.F False Statement on  
Federal Firearms Application

**Disposition**

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**Plaintiff**

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