



Daigle, Harris expressed fear for the safety of her 18-month-old baby and told Daigle that Tommy had chased her down the road with a loaded rifle. Daigle further stated that the boyfriend was still upstairs, explaining that she had not heard him leave.

Four Windham police officers were dispatched to the scene. Meantime, dispatcher John Perruzzi attempted to reach Harris in the upstairs apartment by telephone. Finding the line busy, Perruzzi had the phone company break in on the call and, upon reaching Harris, persuaded her to walk out of the building to speak with the officers waiting outside.

Sergeant David Thomas and Officer Raymond Williams then had a conversation with Harris. Officer Williams explained that the police had been called to the scene because of a report that she had been assaulted and threatened with a firearm. Harris responded simply that she had had an argument with her boyfriend but that he had left a half hour ago. The officers noticed that Harris appeared to be nervous and did not make eye contact with them, looking instead at the infant that she held in her arms. They did not observe any signs of injury, but noted that her eyes were puffy and that she was wearing a long-sleeve shirt and long pants although it was a warm summer morning. Aware of the neighbor's report that the boyfriend was still in the upstairs apartment, and in light of having been trained that victims of domestic violence are often driven by fear of reprisal to protect the abuser from prosecution, the officers did not believe Harris's statement that her boyfriend was no longer upstairs. Accordingly, they asked Harris for permission to enter her apartment. She declined to give such permission, saying only that her apartment was a mess.

Sergeant Thomas advised Harris that the officers would therefore have to enter the apartment without her permission. He advised her that it would be too dangerous for the police to allow her and the baby simply to go back into her apartment because the officers believed a hostage situation

could develop. In deciding to conduct a warrantless entry into and search of the apartment, the officers were influenced by several factors: their belief that Harris was not telling the truth regarding her boyfriend's presence in the apartment, Daigle's statement that the suspect had not left the apartment, the fact that Route 115 is generally a busy highway where traffic was especially heavy at the time because the town's July 4 parade was about to begin, the fact that an antique dealer in a nearby adjacent building was beginning to set up an outdoor display of merchandise for sale, and the presence of a number of other dwellings nearby. In brief, they viewed the totality of the circumstances as exposing a large number of people to risk of harm if the defendant were permitted to remain in the apartment for any length of time at all.

The two officers climbed the stairway to the apartment's main entrance, walked through the unlocked front door and proceeded to search the premises, beginning with the kitchen. Officer Williams quickly checked the back porch of the apartment, accessible through the living room. An enclosed stairway led from the back porch to the ground level, providing a second means of egress from the apartment. Both entrances were under observation by other officers on the ground as the search was executed. Sergeant Thomas and Officer Williams took care to look only in spaces that were large enough to hide a suspect.

After thoroughly searching the apartment and finding no one, Officer Williams decided to look more carefully on the porch. When he did so, he noticed a semiautomatic rifle lying atop the stove on the porch and concluded that it had not been there during the initial sweep of the apartment. Detective Thomas examined the rifle and noted that it contained two rounds of ammunition. Officer Williams peered down the porch stairway and, noticing a large piece of carpet at the bottom of the stairway, called out the name "Tommy," whereupon the defendant emerged from behind the carpet.

Officer Williams ordered the defendant to place his hands in the air and walk up the stairs. The defendant did so without stumbling. At the top of the stairs, Officer Williams did a pat-down search of the defendant and placed him in handcuffs. He then led the defendant through the apartment, out the front door and down the stairway connected to that door. Both Officer Williams and Sergeant Thomas are trained in the detection of intoxication; neither observed any signs that the defendant had been drinking or was intoxicated.

The defendant was placed in the back of a police cruiser and Officer Williams read him the *Miranda* warnings from a pre-printed card. The defendant affirmatively indicated that he understood each of the rights as read to him. He appeared to be listening and showed no signs of intoxication. Speaking in a clear and coherent voice, he also asked the officers to remove some money from his pocket and give it to Harris. En route to the police station, the defendant twice gave what turned out to be false names when asked to identify himself.

During the booking process at the police station, the defendant began to cry and advised Officer Williams that he wanted to tell the police what had really happened. He admitted to having assaulted Harris and that he did not remember whether he had chased her down the road as alleged by Daigle. Apparently the defendant also made incriminating statements concerning his ownership of the rifle discovered at the apartment, although there is nothing about these statements in the record of the suppression hearing.

On July 6, 1994 I issued a warrant authorizing a search of the defendant's apartment for evidence of bank robbery. Part of the basis for the warrant was the FBI's belief that the weapon seized at the Harris-Bartelho apartment was the same one that had been used in a series of bank

robberies. Among the items seized when the search was executed was a quantity of ammunition and a stock and case for a rifle.

## II. Legal Discussion

The defendant seeks the suppression of the evidence seized in the Harris-Bartelho apartment on the ground that the officers' warrantless entry violated his constitutional protection from illegal search and seizure.

It is common ground that the Fourth Amendment forbids only unreasonable searches and seizures; that normally a search is unreasonable absent a warrant issued by a neutral magistrate upon a showing of probable cause; and that to excuse the lack of a warrant, the police must ordinarily bring the case within one or more of a list of exceptions to the warrant requirement.

*United States v. Lopez*, 989 F.2d 24, 26 (1st Cir.) (citation omitted), *cert. denied*, 126 L. Ed. 2d 158 (1993). One such exception permits a warrantless search in light of "exigent circumstances" that would make it improvident for the police to obtain a warrant before acting; one recognized example of exigent circumstances is a situation "where the safety of law enforcement officers or the general public is threatened." *Id.* (citations omitted); *see also United States v. Wilson*, 36 F.3d 205, 209 (1st Cir. 1994) (test is "whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant"). The government contends that exigent circumstances justified their warrantless entry into the apartment to search for the defendant and the weapon he had allegedly used to chase Harris down Route 115 a few hours earlier. Among the factors the court must consider in evaluating the government's claim of exigent circumstances are the gravity of the underlying offense, whether a delay would pose a threat to police or public safety, and whether it is

likely that evidence would be destroyed if the authorities postponed their search to obtain a warrant. *Id.* at 209-10.

The defendant first contends that the officers lacked probable cause to believe that any offense had actually taken place. He points to the lack of visible injuries on Harris when she emerged from her apartment to talk with police, the fact that the police had not directly observed the commission of any crime, the fact that Harris was on the phone when the police first attempted to reach her after being contacted by Daigle and the fact that Harris did not confirm the commission of any crime when she spoke with the police. There is no rigid formula for determining when the police have probable cause to make an arrest; the test is "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Wagenmann v. Adams*, 829 F.2d 196, 206 (1st Cir. 1987) (internal quotation marks and citation omitted). "A fair, reasonable probability that criminal activity is taking or has taken place -- determined under an objective standard -- is the constitutional minimum." *Id.* The determination of probable cause depends on "the cumulative effect of the facts in the totality of the circumstances." *United States v. Baldacchino*, 762 F.2d 170, 175 (1st Cir. 1985). The experience and training of the officers are among the factors to be considered. *Rivera v. Murphy*, 979 F.2d 259, 264 (1st Cir. 1992).

The totality of these circumstances was sufficient to warrant a prudent officer in believing that the crimes described to him by Daigle had, in fact, taken place. Although there were no visible signs of injury to Harris, she did not deny the report that she had been chased by Tommy with a loaded rifle. She indicated only that she had been in an argument with the defendant; as she did so

the officers observed her nervousness and noted that her clothing was inappropriate for the weather. Their apparent hypothesis, that she was evading the facts and may have clothed herself in that manner to conceal injuries, was a reasonable one. The officers' training suggested to them that victims of domestic violence frequently are less than forthcoming when asked by police to implicate their abusers. Nor does the fact that Harris's line was busy when the police initially tried to contact her tend to suggest a lack of probable cause, absent evidence as to the nature of the phone conversation the police caused to be interrupted.

The defendant further contends that, if probable cause existed, it was only probable cause to believe that the defendant had committed a misdemeanor assault. This is an erroneous characterization. The police had a reliable report that the defendant had threatened Harris with a firearm, a Class C felony pursuant to the Maine Criminal Code. *See* 17-A M.R.S.A. §§ 209, 1252(4).

Probable cause notwithstanding, the defendant also takes the position that it would have been only a minor inconvenience for the police to obtain a warrant, given that Harris appeared to be unharmed, had safely exited the building, did not confirm the commission of any crime and had told the police her boyfriend was gone. He also questions the reliability of Daigle's statement to police that he was still inside, given that the Bartelho-Harris apartment had two entrances, each with its own stairway to the street. Of course, the fact that police discovered the defendant when they executed their search attenuates his argument that Daigle's information was unreliable. But for the present purposes, it matters only that the totality of the circumstances, including the information from Daigle, supports a conclusion by the officers that the imminent threat to everyone in the vicinity of the apartment was sufficient to justify their entry without a warrant.

In *United States v. Guarente*, 810 F. Supp. 350 (D. Me. 1993), this court refused to suppress a rifle seized by police officers who entered a home without a warrant after receiving a report of a domestic dispute involving a weapon. *See id.* at 351-53. Noting "the volatile nature of domestic disputes generally," the court found exigent circumstances justifying the warrantless entry. *Id.* at 353. Among the circumstances cited by the court was the officers' knowledge that the gun was still inside the house and their resulting concern that the suspect might do violence to both members of the household, the officers who were in the vicinity and others in the immediate area. *Id.* Although it was less certain to the officers at issue here than it was to the police in *Guarente* that the suspect was actually still inside and armed, their conclusion was reasonable and their decision to enter was prudent. *Cf. United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992) (exigent circumstances existed in domestic violence case involving armed suspect, even though police waited two hours before entering the apartment and suspect had, in fact, fled to parking lot).

Given that the rifle seized by the police was in plain view as they completed their lawful search of the apartment, I conclude that the weapon should not be suppressed. Accordingly, I need not consider the defendant's contention that evidence discovered pursuant to the search warrant I signed on July 6 is "fruit of the poisonous tree" because the rifle seized on July 2 was a basis for my finding of probable cause in connection with the issuance of the warrant.

I also reject the defendant's contention that his confession at the police station subsequent to his arrest should be suppressed because his intoxication and fatigue rendered his statement involuntary. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) (to be valid, a waiver of *Miranda* rights must have been "product of a free and deliberate choice" and made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it").

The government bears the burden of proving voluntariness by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 167-68 (1986). The government has met its burden here, through the testimony of the arresting officers. Although trained and experienced in detecting signs of intoxication, neither detected any such signs in the defendant. Likewise, the fact that the defendant paused during the arrest process to ask the police to remove money from his pocket and give it to Harris, and the defendant's subsequent use of two false names in identifying himself to the police, are sufficient proof that the defendant was fully alert when he opted to talk with the police in spite of the *Miranda* warnings.

### **III. Conclusion**

For the foregoing reasons, I recommend that the defendant's motions 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, 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 at Portland, Maine this 12th day of January, 1995.*

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*David M. Cohen*  
*United States Magistrate Judge*