

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**ROBERT EARL COLE, JR.,**

**Defendant.**

**Case No. CR07-0050**

**REPORT AND RECOMMENDATION**

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***I. INTRODUCTION***

On the 7th day of August 2007, this matter came on for hearing on the Motion to Suppress (docket number 12) filed by the Defendant on July 25, 2007. The Government was represented by Assistant United States Attorney Stephanie Rose. Defendant Robert Earl Cole, Jr., appeared personally and was represented by his attorney, Clemens A. Erdahl. The parties were given until August 10, 2007, to file supplemental briefs.

## ***II. RELEVANT FACTS***

Acting on complaints of suspected drug activity, officers of the Cedar Rapids Police Department conducted surveillance on a residence at 1507 Washington Avenue S.E. in Cedar Rapids. Investigator Brian Freeberg testified that during the afternoon of March 20, 2007, he and his partner, Investigator Dunlinger, observed two black males standing for an extended period in front of the subject property. One of the individuals was standing by the sidewalk, while the other stood up by the porch. According to Freeberg, the subjects were not talking to each other, but were instead standing and looking around.

Investigator Freeberg testified that while he was observing, “a few people” approached the property and would go between the houses with one of the persons standing there. After a short period of time, they would come out and the visiting individual would leave. Based on his training and experience, Freeberg opined that these activities were consistent with drug transactions.

At one point, an individual rode up on a bicycle and went between the houses with one of the subjects. The person on the bike then rode away and officers attempted to stop him. Initially, the bicyclist refused to stop. Investigator Freeberg testified that he was told by a uniformed officer that during the course of the chase, the individual on the bike threw something away. The item was not recovered, however, and the individual was charged only with interference with official acts.

While Investigators Freeberg and Dunlinger were involved in apprehending the individual on the bicycle, Investigator Chip Joecken and his partner, Investigator Lauren Faircloth, took up surveillance of the house at 1507 Washington Avenue S.E. Joecken testified that he observed a gold Jeep drive up to the house. One of the subjects standing outside the house walked over to the Jeep and opened the back passenger door. After a short period of time, the door was closed and the Jeep drove off. Joecken radioed the suspicious activity to Investigators Freeberg and Dunlinger, who then followed the Jeep.

Investigator Freeberg testified that the Jeep stopped in the parking lot at the skate park, located a couple of miles from the subject residence. Freeberg and Dunlinger, who were traveling in an unmarked vehicle and wearing plain clothes, parked three spaces down, exited their vehicle, and approached the Jeep.

The individual in the front passenger side of the Jeep exited the vehicle with a skateboard and was questioned by Investigator Dunlinger. Investigator Freeberg approached the driver's side of the Jeep, verbally identifying himself as an officer and displaying his badge. At Freeberg's request, the driver of the Jeep, identified as Sean Henderson, rolled down the front window. According to Freeberg, he immediately detected the odor of marijuana. Freeberg asked Henderson to step out of the vehicle due to the smell of marijuana. Henderson was searched, but no contraband was located. Officer Dunlinger searched the front seat passenger, but found nothing. A subsequent search of the vehicle likewise did not reveal any marijuana.

According to Investigator Freeberg, he recognized the back seat passenger as one of the subjects whom he had seen in front of 1507 Washington Avenue S.E. He asked the back seat passenger for identification and Defendant Robert Earl Cole, Jr., verbally identified himself. Freeberg testified that he recognized Defendant's name. Freeberg recalled two searches done at Defendant's parents' home, resulting in the seizure of guns and drugs. According to Freeberg, he was also aware of possible gang activity, and testified that Defendant's brother had been acquitted on a shooting charge and another of Defendant's relatives had been shot. While Defendant was still in the car, he admitted to officers that he smoked marijuana the previous night.

Defendant was then told to exit the vehicle. After Defendant exited the vehicle, Investigator Dunlinger asked Defendant for permission to search his person. According to Investigator Freeberg, Defendant was "compliant" and agreed to the search. A gun (Government's Exhibit 5) was found in the jacket (Government's Exhibits 1 and 2) being worn by Defendant. Freeberg testified that there was a hole in the right pocket of the

jacket and the gun was found in the lining. (*See* Government's Exhibits 3 and 4.) According to Freeberg, it would not be difficult to discover a gun in a jacket of this type during a pat down search.

Defendant was then transported to the Cedar Rapids Police Department, where he was advised of his *Miranda* rights. Defendant read a waiver of rights form out loud to the officers and then signed the waiver at 4:25 p.m. (*See* Government's Exhibit 6.) Defendant thereafter admitted that he had smoked marijuana the night before and told officers that he had found the gun under a dumpster.

Investigator Joecken testified that following Defendant's interview, he and Sgt. Robbins asked Defendant for a urine specimen. Defendant agreed to provide a specimen, but initially indicated that he "couldn't go." After drinking some water, however, Defendant subsequently provided a urine sample. Defendant was then released from custody.

The Defendant, age 18, testified at the instant hearing that he saw Investigators Freeberg and Dunlinger at "3rd and 15th" and was aware that they were following the Jeep in which he was riding. After arriving at the skate park, the passenger got out before the officers approached the vehicle in order to do some skateboarding. Defendant confirmed that one of the officers approached the driver's side of the vehicle and identified himself by showing a badge. The officer asked the driver to get out of the vehicle, saying that the car smelled like marijuana.

Defendant testified that a uniformed officer walked up and asked for his name and social security number. Defendant was told to step out of the vehicle and he felt compelled to do so. According to Defendant, he was told that they could search him since they smelled marijuana in the vehicle. Defendant denied being asked to consent to a search of his person, but testified that he would have consented if asked. Defendant admitted that the officer found a gun by patting him down, although Defendant claimed that the gun was in the right coat pocket, not in the lining.

Defendant was then transported to the Cedar Rapids Police Department, where, according to his testimony, he “willingly” signed a waiver of his *Miranda* rights. According to Defendant, he was approached by an officer after giving a statement and told that he had to provide a urine sample “or I couldn’t leave.” Defendant admitted that he then consented to provide a urine sample.

### ***III. ANALYSIS***

In his Supplemental Memorandum (docket number 23) filed following the hearing, Defendant raises three issues. First, Defendant argues that “the officers were not entitled to have the Defendant exit the car.” Second, Defendant claims that his “will was overborne by the officers [sic] threat making his submission to a urine test nonconsensual.” Finally, Defendant claims that “it was not inevitable that either the gun or the positive urine test would have been discovered.”

#### ***A. Was Defendant Unlawfully Seized when Required to Exit the Vehicle?***

Initially, Defendant questions Investigator Freeberg’s credibility in testifying that he detected the odor of marijuana emanating from the vehicle when the driver rolled down the front window. According to Defendant, “[i]t is just too tempting for the officers whose expectation is that they will find some form of drug, to imagine or fudge at the margin and say there was a smell of marijuana.”<sup>1</sup> Defendant notes that no marijuana was found on any of the occupants or in the vehicle.

The mere fact that marijuana was not found in the vehicle does not preclude, however, the possibility that the interior of the vehicle smelled of marijuana. Defendant admitted smoking marijuana the prior evening, although he denied wearing the same clothes. The record is silent whether the Defendant smoked the marijuana in the vehicle in which he was stopped. The record is also silent regarding when the front seat occupants of the vehicle last smoked marijuana, what clothes they were wearing, or whether they or

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<sup>1</sup>See Supplemental Memorandum in Support of Motion to Suppress (docket number 23) at 2.

others smoked marijuana in the vehicle. In addition, Investigator Joecken testified that he observed the vehicle stop in front of the subject residence and the back passenger door open for a short period of time. It is possible that marijuana was in the vehicle prior to the stop and unloaded at that time. In any event, the Court believes that Investigator Freeberg was a credible witness. The Court believes that when the driver was asked to roll down the front window, Freeberg detected the odor of marijuana emanating from the interior.

Preliminarily, the Court notes that Defendant does not challenge the officers' right to approach the vehicle and question its occupants. Not every encounter with police constitutes a "seizure" within the meaning of the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions."); *United States v. Drayton*, 536 U.S. 194, 200 (2002) ("law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in any other public places and putting questions to them if they are willing to listen."). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968).

Defendant in the instant action argues, however, that an impermissible seizure occurred when Defendant was ordered to exit the vehicle. "[A] seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Brendlin v. California*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2400, 2405 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544 (1980)). Whether an officer's request for an occupant to exit a vehicle constitutes a "seizure" within the meaning of the Fourth Amendment depends on the circumstances.

An authoritative order or command to exit a vehicle effects a seizure, while a request - with its implication that the request may be refused - gives 'no indication' that consent is required.

*United States v. Vera*, 457 F.3d 831, 835 (8th Cir. 2006) (internal citations omitted). In *Vera*, a deputy sheriff approached a parked vehicle in a rest area off Interstate 80 and asked the passenger whether he “wouldn’t mind stepping out so I can talk to him for a few minutes.” *Id.* at 833. Defendant testified at the suppression hearing, however, that the deputy “told him in a loud, authoritative voice to get out of the car at the beginning of the encounter, that he ‘never behaved in a kindly manner,’ and that [the deputy] told him in a loud voice to get into the patrol car.” *Id.* at 834. Relying on the magistrate judge’s finding that the officer’s description of the events was more credible, the Eighth Circuit concluded that “there is no basis to conclude that the encounter was anything other than consensual.” *Id.* at 836.

On the other hand, in *United States v. Carpenter*, 462 F.3d 981 (8th Cir. 2006), Defendant was “asked” to exit his vehicle, patted down for weapons, and told that if he did not consent to a search, then the deputy would call a nearby officer with a drug dog. Under these circumstances, the Government did not dispute that a “seizure” occurred within the meaning of the Fourth Amendment. *Id.* at 986.

Turning to the facts in the instant action, the record is imprecise regarding the manner in which Defendant was instructed to exit the vehicle. There is no indication that the officer displayed a weapon, but it is undisputed that he showed his badge and instructed Defendant to exit the vehicle.<sup>2</sup> I believe it is unnecessary to determine whether a “seizure” occurred when Defendant was told to exit the vehicle, however, since the officers had “reasonable suspicion of illegal activity sufficient to justify an investigative detention.” *Carpenter*, 462 F.3d at 986.

For an investigative *Terry*-type seizure to be constitutional under the Fourth Amendment, an officer must be aware of “particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed.” Although a

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<sup>2</sup>Defendant testified that it was a uniformed officer who ordered him to exit the vehicle.

reasonable suspicion requires more than an “inchoate hunch,” the officer need only “articulate some minimal, objective justification for an investigatory stop” in order to comply with the Fourth Amendment. “Whether the particular facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances.” When considering the circumstances involved, due weight must be given “to the factual inferences drawn by the law enforcement officer.”

*United States v. Donnelly*, 475 F.3d 946, 952 (8th Cir. 2007) (all citations omitted).

The officers in this case had a house under surveillance and observed several encounters which they reasonably believed to be drug transactions. A bicyclist leaving the scene after one such transaction threw something away while being chased by police. The vehicle occupied by Defendant pulled up to the house, the back door (where Defendant was seated) was opened for a short time, and the vehicle then drove off. Upon approaching the stopped vehicle at the skate park, the officer detected an odor of marijuana. While still seated inside the car, Defendant admitted smoking marijuana the preceding evening.

The Court must consider the totality of circumstances in evaluating whether there was reasonable suspicion that criminal activity was afoot. *Carpenter*, 462 F.3d at 986. “Reasonable suspicion is a lower threshold than probable cause, and it requires considerably less than proof of wrongdoing by a preponderance of the evidence.” *Id.* (internal citation omitted). I believe that the officers in this case had particularized, objective facts which generated reasonable suspicion of illegal activity sufficient to justify an investigative *Terry*-type seizure.

In summary, the Fourth Amendment was not implicated when the officers approached the Defendant’s vehicle in a public place to ask questions. A “seizure” within the meaning of the Fourth Amendment may or may not have occurred when Defendant was instructed to exit the vehicle. Even if the Court concludes that a *Terry*-type seizure occurred at that time, however, it was supported by reasonable suspicion of illegal activity.

Therefore, it was not violative of the Fourth Amendment and Defendant is not entitled to relief on that ground.

***B. Was Defendant's Consent to Giving a Urine Sample Voluntary?***

After giving a statement at the Police Department, Defendant was asked to provide a urine sample.<sup>3</sup> According to Investigator Joecken, Defendant agreed to provide a specimen, but was unable to “go” until after he had been provided water. Defendant, on the other hand, testified that he was told by an officer that he was required to provide a urine sample “or I couldn’t leave.” It is undisputed that Defendant consented to officers’ request that he provide a urine sample. The issue presented by Defendant is whether “Defendant’s will was overborne,” thereby rendering Defendant’s consent involuntary.

“[T]he question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The burden is on the Government to show Defendant voluntarily consented. *United States v. Reinholz*, 245 F.3d 765, 780 (8th Cir. 2001). In *United States v. Chaidez*, 906 F.2d 377 (8th Cir. 1990), the Court helpfully gathered the factors to be considered in determining the voluntariness of a consent to search.

The following characteristics of persons giving consent are relevant when assessing the voluntariness of the consent: (1) their age, (2) their general intelligence and education, (3) whether they were intoxicated or under the influence of drugs when consenting, (4) whether they consented after being informed of their right to withhold consent or of their *Miranda* rights, and (5) whether, because they had been previously arrested, they were aware of the protections afforded to suspected criminals by the legal system.

In examining the environment in which consent was given, courts should ask whether the person who consented: (1) was

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<sup>3</sup>A urine test is a search within the meaning of the Fourth Amendment. See *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001); *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

detained and questioned for a long or short time, (2) was threatened, physically intimidated, or punished by the police, (3) relied upon promises or misrepresentations made by the police, (4) was in custody or under arrest when the consent was given, (5) was in a public or a secluded place, or (6) either objected to the search or stood by silently while the search occurred.

*Id.* at 381 (all citations omitted) (cited with approval in *United States v. Morreno*, 373 F.3d 905, 910 (8th Cir. 2004)). *See also United States v. Perry*, 437 F.3d 782, 785 (8th Cir. 2006).

Turning to the facts in the instant action, Defendant is eighteen years old. The record is silent regarding the extent of Defendant's education, but at the time of hearing he appeared to be of normal intelligence. Defendant did not appear to be intoxicated or under the influence of drugs when consenting to the search, although he admitted that he had smoked marijuana the prior evening. Defendant had been advised of his *Miranda* rights and voluntarily gave a statement, but he apparently was not specifically told that he had a right to withhold consent to the officers' request for a urine sample. Defendant testified that he had "interactions" with officers as a juvenile, but it is unclear whether he was "aware of the protections afforded to suspected criminals by the legal system."

Defendant was transported to the Cedar Rapids Police Department for questioning, but was apparently not detained for a long period of time. There is no evidence that he was threatened, physically intimidated, or punished by the police. Defendant's principal contention is that he was told by police that he could not leave until he submitted a urine sample and that he relied on that misrepresentation. Defendant was not under arrest when the consent was given. Defendant consented in a public place, albeit a police station. The sixth factor set forth above would appear to be inapplicable to a search involving production of a urine sample.

After considering the totality of the circumstances, I believe that the Government has failed to meet its burden of proving by a preponderance of the evidence that

Defendant's consent to providing a urine sample was voluntary. Defendant, who is just eighteen years old, was transported by officers to the Cedar Rapids Police Department for questioning. Defendant was erroneously told by officers that he "couldn't leave" unless he submitted a urine sample.<sup>4</sup> While Defendant apparently had some contacts with police as a juvenile, the record is silent regarding the nature of those contacts and it does not appear that Defendant has substantial awareness of the protections afforded to suspected criminals by the legal system. After considering all of the circumstances, I believe that Defendant's consent to submit a urine sample was coerced and, therefore, not "voluntary" within the meaning of the Fourth Amendment.

In summary, it is undisputed that Defendant consented to provide a urine sample while at the Cedar Rapids Police Department. The Fourth Amendment requires, however, that the consent be voluntary and not the product of duress or coercion. I believe the misrepresentation that Defendant would not be permitted to leave unless he submitted a urine sample, coupled with Defendant's age and relative inexperience, renders the consent involuntary. Therefore, the warrantless search, absent consent, violates the Fourth Amendment and the results of the urine test must be suppressed.

***C. Does the Inevitable Discovery Exception to the Exclusionary Rule Apply?***

In its pre-hearing Memorandum in Support of Resistance to Defendant's Motion to Suppress, the Government argued that "Defendant's gun would have been inevitably discovered during either the search incident to his arrest or to the *Terry* pat-down search." *See* Government Memorandum, docket number 20-2 at 10. Apparently in response to that argument, in his post-hearing Supplemental Memorandum in Support of Motion to Suppress, Defendant argues that "[i]t was not inevitable that either the gun or the positive urine test would have been discovered." *See* Supplemental Memorandum, docket number

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<sup>4</sup>Defendant testified at the hearing that he was told by an officer that he was required to provide a urine sample "or I couldn't leave." The Government did not recall Investigator Joecken to rebut Defendant's testimony in that regard.

23 at 7. For the reasons which follow, the Court believes that the inevitable discovery doctrine has no application in this case.

In *Nix v. Williams*, 467 U.S. 431 (1984), the United States Supreme Court noted that “[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.” *Id.* at 446. Accordingly, the Court adopted the inevitable discovery exception to the exclusionary rule. The Eighth Circuit Court of Appeals has established a two-prong test for application of the rule:

“To succeed under the inevitable-discovery exception to the exclusionary rule, the government must prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation.”

*United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997). *See also United States v. Thomas*, 480 F.3d 878, 881 (8th Cir. 2007).

As set forth in Part III (A) above, the Court believes that there was no constitutional violation in requiring Defendant to exit the vehicle. Cases implementing the exclusionary rule “begin with a premise that the challenged evidence is in some sense the product of illegal governmental activity.” *Nix*, 467 U.S. at 444 (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)). There was no misconduct by the police in their acquisition of the weapon found in Defendant’s coat. The officers had reasonable suspicion justifying Defendant being required to exit the vehicle. Defendant then consented to a search of his person.<sup>5</sup> Even if Defendant had not consented to the search, however, the officers could have patted Defendant down for weapons, *Terry v. Ohio*, 392 U.S. 1 (1968), and the weapon would have been discovered at that time.

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<sup>5</sup>Defendant could not remember if he was asked to consent, but testified that he would have consented to the search if asked.

On the other hand, the Court concluded in Part III (B) above that Defendant's Fourth Amendment rights were violated by a nonconsensual warrantless collection of a sample of Defendant's urine. Therefore, the exclusionary rule prevents the introduction of the test results unless the Government meets its burden of proving by a preponderance of the evidence that the inevitable discovery exception to the exclusionary rule applies. The second prong of the inevitable discovery doctrine requires a finding that the Government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation. There is no indication in the instant action that the Government would have been able to obtain a sample of Defendant's urine at that time through any means other than his voluntary consent. Therefore, "discovery" of Defendant's urine was not inevitable through some other means and the exception to the exclusionary rule does not apply.

#### ***IV. SUMMARY***

Defendant concedes that the Fourth Amendment was not implicated when officers approached the vehicle in which Defendant was a passenger, in order to ask questions. Defendant claims, however, that he was unconstitutionally "seized" when he was directed to exit the vehicle. I believe it is unnecessary to resolve that question directly, however, since the officers had reasonable suspicion of illegal activity sufficient to justify an investigative detention in any event. After the Defendant exited the vehicle, he consented to a search of his person. Even absent such consent, however, the reasonable suspicion which justified the "seizure" also would have justified a pat-down which would have resulted in the discovery of the weapon. Therefore, Defendant's Motion to Suppress as it applies to the discovery of a weapon on Defendant's person should be denied.

It is undisputed that Defendant consented to providing a urine sample.<sup>6</sup> To survive constitutional scrutiny, however, it is required that the consent be "voluntary." In this case, the eighteen-year-old Defendant was taken by officers to the Cedar Rapids Police

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<sup>6</sup>Indeed, it would be difficult to obtain a urine sample in any other way.

Department and told that he would not be permitted to leave until he provided a urine sample. Accordingly, I believe Defendant's consent was coerced and, therefore, violative of the Fourth Amendment. The Court concludes that the portion of Defendant's Motion to Suppress pertaining to introduction of the urine test results should be sustained.

***V. RECOMMENDATION***

For the reasons set forth above, I respectfully recommend that the District Court **GRANT IN PART** and **DENY IN PART** Defendant's Motion to Suppress (docket number 12) as follows: The Government should be precluded from offering any evidence or argument regarding the test results of the urine sample taken from Defendant on March 20, 2007. In all other respects, the Motion to Suppress should be denied.

The parties are advised, pursuant to 28 U.S.C. § 636(b)(1)(B), that within ten (10) days after being served with a copy of these proposed findings and recommendations, any party may serve and file written objections with the District Court.

DATED this \_\_\_\_\_ day of August, 2007.

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JON STUART SCOLES  
United States Magistrate Judge  
NORTHERN DISTRICT OF IOWA