IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	02cr20288 B/P
OSAYAMIEN OGBEIWI,	)	
	)	
Defendant.	)	
	)	

REPORT AND RECOMMENDATION ON
DEFENDANT OSAYAMIEN OGBEIWI'S MOTION TO SUPPRESS

Defendant Osayamien Ogbeiwi was indicted on August 14, 2002, on one count of possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). Officers of the Memphis Police Department ("MPD") allegedly found the weapon, a Smith & Wesson .40-caliber pistol, in the defendant's coat pocket. The government contends that an officer recovered the defendant's coat after chasing the defendant through residential yards and over chainlink fences surrounding the backyard of the defendant's house. According to the government, while on the run, the defendant snagged his coat on his backyard fence, which caused the coat to fall off his body as he continued his flight. After the officers caught the defendant, they returned to the area where the defendant lost his coat. Upon searching the coat's pockets, the police found

two guns, including the one with an obliterated serial number which gave rise to the indictment in this case.

On March 20, 2003, the defendant filed a motion to suppress the guns found inside his coat. The defendant argues only one point.[1] He contends the police violated his rights under the Fourth Amendment when they seized his coat and searched its pockets after the chase, since the coat had fallen inside a locked, fenced-in area behind his home. The defendant contends that this backyard area falls within the curtilage of his home, and that the police needed a warrant to seize his coat, one they did not have.

The government filed a response to the defendant's motion on May 7, 2003. The government first argues that the coat was not in the backyard, as the defendant claims, but in the front yard, and therefore no warrant was necessary. Even if the coat was in the backyard, the government asserts that a warrant was not needed under these circumstances. The events in this case, it argues, fit under two exceptions to the Fourth Amendment's warrant requirement. According to the government, at the time of the seizure of the

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[1]Although the defendant initially argued other issues in his motion, at the suppression hearing the parties narrowed the scope of the motion. Specifically, the defendant moved to suppress allegedly incriminating statements he made to officers after his arrest, in violation of his Miranda rights. The government stated in open court that they would not use any of the defendant's statements in its case-in-chief. Also, the defendant no longer disputes the government's position that the police officers were justified in chasing and later arresting the defendant.

defendant's coat, the police were in "hot pursuit" of the defendant, a fleeing felon. The government also asserts that there was a risk of danger to the police and others which obviated the officer's need to obtain a warrant.

The District Court referred the defendant's Motion to Suppress to the United States Magistrate Judge for a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). On July 1, 2003, this court held an evidentiary hearing on the motion. During the hearing, the government called one witness, MPD patrol officer Ivory Robinson. The defendant called two witnesses, Eziza Iyore Ogbeiwi Risher (defendant's mother) and Ogbemudia Ogbeiwi (defendant's brother). One exhibit was admitted into evidence: the MPD arrest report (Def. Ex. 1). For the reasons that follow, this court recommends that the defendant's Motion to Suppress be granted.

I. PROPOSED FINDINGS OF FACT

A. The Chase

At around midnight on January 12, 2002, Kennitha Watt was at the Exxon service station at 3151 Perkins Road in Memphis, Tennessee, when she was approached by three black juvenile males. One of the juveniles wore a ski mask and a black coat. He pointed a silver handgun at Watt, and attempted to rob her. Watt immediately ran inside the service station and called the police. Watt advised the police that the three males fled the Exxon station

in a northwest direction towards Knight Road.

Shortly thereafter, MPD officers responded to the call. An officer positioned in the area spotted three black males fitting the description of the three males who attempted to rob Watts.[2] One of the males was wearing a black coat as described by the victim. The three males were traveling in the direction of Cottonwood Road and Knight Road, northwest of the Exxon station.

Officers traveled to that residential location and set up a perimeter in the area where the three men were last seen. MPD Officer Ivory Robinson,[3] who was on foot searching for the three males, spotted the defendant wearing a black "puffy" coat. Officer Robinson repeatedly shouted words to the effect of "stop" and "police." The defendant, instead of complying with Officer Robinson's instructions, ran towards what the police later found out was his house.

Officer Robinson pursued the defendant. While running towards his house at 4566 Cottonwood Road, the defendant hopped a series of fences, with Officer Robinson trailing closely behind. As the defendant reached the backyard of his house, he jumped over a four-foot high chainlink fence and into his backyard. Officer Robinson, seeing that there were dogs in the backyard, did not follow the

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[2]There was no additional evidence presented at the hearing regarding the description of these three males.

[3]On the date in question, Officer Robinson had two years experience as a police officer.

defendant over the fence. Instead, Officer Robinson continued chasing the defendant by running through the defendant's next door neighbor's backyard.[4] Officer Robinson observed the defendant running through his backyard towards the front of the house. The defendant approached the fence separating the backyard from the front yard and jumped the fence. In doing so, he came out of his coat, and a glove he was wearing got caught on the fence. When the defendant reached the front yard of his house, other MPD officers who were assisting that night caught the defendant and took him into custody.

B. The Seizure of Evidence

Officer Robinson testified that while he was chasing the defendant, the defendant's black coat and glove snagged on the chainlink fence as he jumped from the backyard into the front yard. Officer Robinson said that although these items were caught on the fence, he did not stop to get them because he was chasing the defendant. Only after the chase was over, when other MPD officers were escorting the defendant to the patrol vehicle, did Officer Robinson return to the area where the coat fell. Officer Robinson testified that he knew that the pursuit was over, that he did not see the other suspects around, and that there was no present danger.

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[4]As discussed later, the defendant's backyard is completely enclosed by a chainlink fence. The only access into the backyard is through a locked gate or through the backdoor of the house.

Officer Robinson testified that the fence separated the backyard from the front yard and the neighbors' yards, and that the front portion of that fence (which caused the defendant to lose his coat) was attached to a carport. Officer Robinson testified that he found the coat on the ground on the front yard side of the fence. The glove was still caught on the fence. Officer Robinson did not see a gun or anything else protruding from the coat's pockets. He picked up the coat, searched its pockets, and found the two guns. Officer Robinson and the other officers continued to search for the other two missing juveniles that night. They questioned some of the occupants inside the defendant's home. The officers also searched the area surrounding the defendant's backyard, but did not find anyone. Since the officers' view of the backyard was unobstructed, they did not have to physically enter the fenced-in area.[5]

C. The Factual Dispute

The defendant disagrees with the government's account of the facts on one major point: he contends that the coat was actually located behind the fence inside the backyard, and that the police retrieved the coat by leaning over the fence and picking it up with a nightstick. In support of his position, the defendant called as

[5]Officer Robinson also testified that a ski mask was later found, although there was no evidence regarding where the mask was found or who owned that mask. The arrest report does not reflect that the officers recovered a ski mask, nor does the report indicate that a glove was recovered.

witnesses his mother and younger brother. He also points to the arrest report, which states that the defendant's coat was found "in the backyard."

1. Defendant's Mother

Eziza Iyore Ogbeiwi Risher, the defendant's mother, testified that the defendant lives with her at the 4566 Cottonwood Road residence. There is a carport next to the house, and attached to the carport is a chainlink fence that encloses the backyard. At around midnight on January 12, 2003, she was awake at her house with her son Ogbemudia Ogbeiwi (age 14 at the time) and other family members when Ogbemundi told her to come to the kitchen window. When she looked out the kitchen window, she saw several police officers with flashlights in the backyard area and at the side of her house.[6] She testified that it appeared to her that they were searching for something or someone. She testified that she saw two male officers and one female officer standing on the front yard side of the fence next to the carport. Risher testified that one of the male officers leaned over the fence and, using a stick, picked up a coat that was on the ground in the backyard behind the fence. It appeared to her that the officers were having a difficult time getting at the garment. Risher testified that eventually they retrieved the coat with the stick, placed the coat

[6]Risher testified that the officers did not enter the backyard.

on the ground on the front yard side, and started hitting the coat with the stick.[7] Upon seeing this, Risher immediately went outside and asked the officers what was happening. The officers instructed her to get back inside her house.

2. Defendant's Brother

The defense also called Ogbemudia Ogbeiwi, the defendant's younger brother, to testify. He, too, was inside the house at 4566 Cottonwood Road on the night of January 12, 2002. Ogbemudia testified that he went to the kitchen window after hearing his dogs barking in the backyard.[8] When Ogbemudia went to the window, he saw police on the property with flashlights. Ogbemudia said that he saw officers near the fence separating the front yard from the backyard. Ogbemudia saw one of the officers leaning over the fence and, using a nightstick, trying to retrieve a coat that was inside the fenced-in area in the backyard. The officer eventually retrieved the coat, placed it on the ground, and poked at it with his nightstick as the other officers shined their flashlights on the coat.

3. The Arrest Report

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[7]The officers later questioned Risher about the other two juveniles who were still missing. Risher testified that the officers never asked her for permission to search her backyard.

[8]The dogs are kept in the backyard, which is completely enclosed by a four-foot high chainlink fence. Ogbemudia testified that the only way to access the backyard is through the gate (which is padlocked) or through the house.

Finally, the defendant points to the arrest report as further evidence that the coat was retrieved from his backyard. Officer Robinson testified at the suppression hearing that, although he did not write the report himself, he provided the information to the reporting officer, reviewed the information in the report, and verified that the information was correct. The report states that the defendant's coat was found in the backyard.

It is submitted that the defendant's version of where the coat was located – in the backyard behind the fence – is more credible than the government's version. The court is confronted with conflicting testimony regarding where the coat was found. However, what tips the scale in favor of the defendant is the MPD arrest report.[9] Although there are a variety of typographical errors in the report, the report unambiguously states that the defendant's coat was found in the backyard. Officer Robinson testified that he provided the information to the reporting officer who wrote the report, and that he reviewed the report and verified that the information was correct. Although the government implied at the suppression hearing that this was yet another typographical error in the report, the government did not call any witnesses, such as the reporting officer, who may have been able to explain this discrepancy. Nor were witnesses called to buttress Officer

[9]The court may consider hearsay evidence at a suppression hearing. See United States v. Killebrew, 594 F.2d 1103, 1105 (6th Cir. 1979).

Robinson's testimony.

Accordingly, it is submitted that the defendant's coat was retrieved by the officers in the backyard of the defendant's property, not the front yard.[10] The court also accepts as fact the uncontradicted testimony that the defendant's backyard is surrounded by a four-foot high chainlink fence; that the only way to enter the backyard is to enter through the gate (which is padlocked), through the house and out the back door, or by jumping the fence; and that the defendant and his family kept dogs in the backyard. Finally, it is submitted that one or more police officers leaned over the defendant's fence, and, only after some difficulty, retrieved the coat with a nightstick.

II. PROPOSED CONCLUSIONS OF LAW

The Fourth Amendment protects individuals from unreasonable searches and seizures. It provides that:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. This protection has been extended to the curtilage area of a house, since for Fourth Amendment purposes, the

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[10]This court did, of course, give due consideration to the fact that Risher and Ogbemudia are blood relatives of the defendant. See United States v. Robinson, 530 F.2d 1076, 1081 n.8 (D.C. Cir. 1976).

curtilage is considered part of the house. See United States v. Jenkins, 124 F.3d 768, 772 (6th Cir. 1997); see also United States v. Dunn, 480 U.S. 294, 300-01 (1987); Dow Chemical Co. v. United States, 476 U.S. 227, 235 (1986); California v. Ciraolo, 476 U.S. 207, 212-13 (1986); Oliver v. United States, 466 U.S. 170, 178-82 (1984); Daughenbaugh v. City of Tiffin, 150 F.3d 594, 598 (6th Cir. 1998). As the Sixth Circuit observed in Dow Chemical Co. v. United States, 749 F.2d 307 (6th Cir. 1984), aff'd, 476 U.S. 227 (1986):

> The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is not true simply in a mechanical sense because the areas are geographically proximate. It is true because people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house.

Id. at 314.

The Supreme Court has identified four factors for courts to consider when assessing "whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." Dunn, 480 U.S. at 300. These four factors are as follows: "(1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing." Jenkins, 124 F.3d at 772 (quoting Dunn, 480 U.S. at 301).

The Sixth Circuit has, on two occasions, considered the issue

of whether a defendant's backyard fell within the curtilage of the home. In Jenkins, the Sixth Circuit held that police violated the defendants' Fourth Amendment rights when they conducted a warrantless search of the defendants' backyard. Id. at 772-73. There, officers conducted an aerial inspection of wooded fields that abutted the defendants' property. They concluded that the defendants were growing large amounts of marijuana in the woods, and decided to conduct a search of that area. However, instead of entering the woods through a gate located down the road from the home, the police entered the woods through the defendants' backyard. While passing through the backyard, the police spotted and seized several items that linked the defendants to the marijuana located in the woods. Id. at 770-71.

After considering the Dunn factors, the Sixth Circuit concluded that the backyard fell within the curtilage of the home. Id. at 773. This conclusion was based on the fact that the defendants' backyard was in close proximity to their house, the yard was enclosed on three sides by a wire fence, they used the backyard for gardening and hanging their wet laundry, and the yard was well shielded from the view of people passing by. Accordingly, the officers were found to have violated the defendants' Fourth Amendment rights by not obtaining a warrant prior to entering the

backyard.[11] Id.

The Court also held that the warrantless entry and search of the backyard in Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998), was in violation of the Fourth Amendment. In that case, officers suspected that stolen property was being stored in the garage behind Daughenbaugh's house. Believing that Daughenbaugh would consent to a search of his garage, officers went to his house without a warrant. Upon learning that Daughenbaugh was not at home, the officers entered the backyard area and saw what appeared to be stolen goods strewn across the floor of the open garage. The home owner, Daughenbaugh, filed a civil action under 42 U.S.C. § 1983 against the officers for violating his Fourth Amendment rights. The Sixth Circuit, relying on Jenkins, held that the plaintiff's backyard fell within the protected curtilage of his house. Id. at 601-02.

Applying the Dunn factors to the facts before this court, it is submitted that the outcome ought not be any different. The defendant's backyard area is in close proximity to the house itself. The backyard is completely enclosed by a four-foot high, locked, chainlink fence. Access to the backyard is either through the backdoor of the house or through a padlocked gate. The defendant's backyard area is home for the family dogs. Indeed,

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[11]The Court, however, affirmed the defendants' conviction because the admission of the tainted evidence was harmless error. Id. at 774.

Officer Robinson testified that the reason he did not follow the defendant into the backyard during the chase was because of the dogs. Although there was no testimony relevant to the fourth Dunn factor – that is, what steps were taken to protect the area from observation – it is hardly fatal to the defendant's motion. See Jenkins, 124 F.3d at 772 (explaining that the test articulated by the Supreme Court in Dunn is not a "rigid test"). The first three factors tip the balance and compel only one conclusion: the defendant's backyard is within the home's curtilage, and therefore entitled to protection under the Fourth Amendment. Thus, the officers violated the defendant's Fourth Amendment rights when they reached into his backyard and seized his coat without a warrant. See Jenkins, 124 F.3d at 774-75 (explaining that even if officers observed incriminating evidence in plain view while standing in a location where they were lawfully entitled to be, their subsequent entry into the defendants' curtilage to seize that evidence was unlawful).

The government attempts to parry this finding by arguing in the alternative that even if the defendant's coat was seized from the backyard, the officers did not need a warrant because of exigent circumstances, namely: (1) they were in "hot pursuit" of the defendant, and (2) there was a risk of danger to the officers and others. See United States v. Haddix, 239 F.3d 766, 767 (6th Cir. 2001) (recognizing three exigent circumstances exceptions to

the warrant requirement; "hot pursuit of a fleeing suspect, where a suspect represents an immediate threat to the arresting officers or the public; or where immediate police action is needed to prevent the destruction of vital evidence or to thwart the escape of known criminals"). Neither of these exceptions to the warrant requirement applies in this case.

First, although officers may under certain circumstances pursue a fleeing suspect into a constitutionally protected area to effect an arrest, see Warden v. Hayden, 387 U.S. 294, 298-99 (1967), this exception to the warrant requirement does not allow officers to conduct an unlimited search of protected areas after the suspect is in custody. If the suspect runs into a house and is arrested inside, then officers may conduct a search incident to arrest, as well as conduct a limited protective sweep if the officers have a reasonable belief that there are other people hiding in the house who pose a danger. See Chimel v. California, 395 U.S. 752, 763 (1969) (discussing search incident to arrest); Maryland v. Buie, 494 U.S. 325, 327 (1990) (discussing protective sweep). The government, however, has not cited any case authority – and the court can find none – that justifies extending the hot pursuit doctrine to allow officers to search a protected area for evidence after the fleeing suspect has been taken into police custody at a location separate and apart from the protected area

that is searched.[12]

Second, the seizure of the defendant's coat cannot be justified on the basis of officer or public safety. This exception applies where "a suspect represents an immediate threat to the arresting officers or the public." Haddix, 239 F.3d at 767. Officer Robinson testified that after the defendant was in custody, he did not perceive that there was any danger at that time. The officers had an unobstructed view of the defendant's backyard, and with their flashlights, saw that there was no one in the backyard except the dogs. Although the other two juveniles and a gun were unaccounted for when the defendant was in custody, those facts alone do not give the police the authority to intrude upon protected areas to search for evidence.[13] Id. at 768 (holding that

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[12]The cases cited by the government in its response brief speak generally to the hot pursuit and officer safety exceptions. However, none of these cases supports the officers' search under the present set of facts.

[13]The government argued at the suppression hearing that had Officer Robinson been able to catch the defendant before he jumped into his backyard, the seizure of his coat would have been lawful and, thus, this court's decision should not turn on whether the coat happened to fall in the backyard or front yard. To be sure, the facts of this case are unusual. Had the officer caught the defendant before he scaled the backyard fence, the officer would have found the guns after conducting a search incident to arrest. See Chimel, 395 U.S. at 763. The officer also would have found the guns had he jumped the fence with the defendant and arrested him in the backyard in hot pursuit. And, had the defendant's coat fallen off his body before he jumped into the backyard or after he made it to the front yard, the officer could have seized the coat under the Supreme Court's decision in California v. Hodari D., 499 U.S. 621, 629 (1991). These different scenarios demonstrate that the Fourth Amendment

officers' warrantless seizure of assault rifle they saw on porch through storm door was not justified by exigent circumstances; there was no serious safety threat because the "weapon was not attended by a person who could have used it.")

III. RECOMMENDATION

It is submitted that on the night of January 12, 2002, one or more MPD officers invaded the defendant's protected curtilage without a warrant by reaching over his fence with a nightstick and seizing his coat. The two guns found inside the coat, one of which gave rise to the indictment in this case, are therefore fruits of the tainted search. Accordingly, it is recommended that the defendant's Motion to Suppress be GRANTED.

Respectfully submitted this ____ day of August, 2003.

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TU M. PHAM
U.S. MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

ANY PARTY OBJECTING TO THIS REPORT MUST MAKE ARRANGEMENTS FOR A TRANSCRIPT OF THE HEARING TO BE PREPARED.

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analysis is fact-specific and whether a search is lawful sometimes turns on only one factual detail.