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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 11-CR-20143 A/P**
	)	
DANNY DAVIS,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Danny Davis's Motion to Suppress Evidence, filed on April 2, 2012. (ECF No. 30.) The government filed a response in opposition on April 16, 2012. The court set the motion for a hearing on April 24, 2012, but granted defendant's request for a continuance and reset the hearing to May 21, 2012. At that hearing, present were Assistant U.S. Attorney Jennifer Webber, Assistant Federal Public Defender David Bell, and defendant Danny Davis. The court heard testimony from Officer Eric A. Chapman with the Memphis Police Department ("MPD") and Captain Deborah Oliver Hammonds with the Shelby County Sheriff's Office ("SCSO"). The court also received into evidence several exhibits: a photograph of the handgun seized on January 31, 2011; a Miranda rights waiver form; an arrest ticket for the January 31 arrest of Davis; a photograph of a written notice on a phone at the jail facility located at 201 Poplar Avenue

in Memphis ("201 Poplar") warning detainees that calls may be recorded; a copy of pages of the Inmate Handbook for SCSO ("Inmate Handbook"); a record of phone calls placed by Davis on January 31 and February 1, 2011, while he was detained at 201 Poplar; and certified copies of criminal judgments for Davis. At the conclusion of the May 21 hearing, the court granted the government's oral motion for a continuance of the hearing.

On May 25, 2012, the court resumed the hearing and received additional testimony from Captain Hammonds and the following exhibits: an Inmate Issued Property Acknowledgment form signed by Davis, a copy of Davis's criminal history, and a complete copy of the Inmate Handbook. At the conclusion of the May 25 hearing, the court granted another oral motion by the government to continue the suppression hearing so that the government could call an additional witness. The suppression hearing was concluded on June 13, 2012, at which time the court received testimony from Deputy Michael Harber of the SCSO.

The court has carefully considered the memoranda of law filed by Davis in support of his motion to suppress, the government's response, the evidence presented, counsel's arguments, and the applicable law. Based on this record, the court submits the following Proposed Findings of Fact and Conclusions of Law, and recommends that Davis's motion be granted in part and denied in part.

I. PROPOSED FINDINGS OF FACT

The court has heard testimony from Officer Chapman, Captain Hammonds, and Deputy Harber. The court has carefully listened to their testimony of the events in question and has observed their demeanor as they testified. As to the testimony of Officer Chapman regarding the seizure of the handgun and statements made by Davis, the court finds his testimony to be credible and adopts his version of events. As to the testimony of Captain Hammonds and Deputy Harber, to the extent they provided conflicting testimony, the court credits the testimony of Deputy Harber over that of Captain Hammonds. Deputy Harber appeared to be more knowledgeable regarding the inmate phone system at 201 Poplar than Captain Hammonds.

On January 31, 2011, MPD Officers Chapman and Majewski were on routine patrol in their marked police vehicle in Memphis, Tennessee. At approximately 9:00 p.m., the officers were near the intersection of Pershing and Hollywood. Officer Chapman knew the intersection to be a high drug crime area. Officer Chapman observed two men standing in the front yard of a house on the corner of Pershing and Hollywood. Although it was dark outside, there were lights from the homes and street lights that enabled the officers to see what the men were doing. Officer Chapman observed the men for ten to fifteen seconds. Officer Chapman saw one man, later identified as Danny Davis, holding out the palm of his hand

to the other man. Davis was seen using his other hand to move something around in his open palm. At this time, the officers were approximately 30 to 40 feet away from Davis. Officer Chapman believed that Davis and the other man were engaged in a drug transaction. Officer Chapman based this belief on his training and experience as a police officer, as well as his experience growing up in a housing project during which time he saw many hand-to-hand drug transactions.

Officer Chapman then exited the police vehicle and approached the two men. He heard the unidentified man tell Davis that the police were there. Davis then fled the scene on foot, at which time Officer Chapman immediately pursued him. Officer Chapman gave Davis verbal commands to stop, but he continued to flee. At no time did the officers draw their weapons. Officer Majewski drove around the corner to try to cut off Davis's flight path. As Officer Chapman chased Davis, he saw Davis throw a shiny object from his left hand. Officer Chapman believed that the object was either a weapon or drugs contained in aluminum foil. Davis ran down an alley and as he attempted to climb a fence, Officer Chapman caught him. Davis was placed in handcuffs, brought back to the police vehicle, and placed in the backseat. While Davis was in the backseat, Officer Chapman asked him why he ran. Davis stated in response that he was trying to sell three crack rocks for $15.00 when the officers saw him, and that he dropped the crack rocks

before he started to run. Officers retraced Davis's flight path and, using their flashlight, found a handgun at the same location where Davis threw the shiny object.[1] The officers did not find any crack rocks or other drugs. After the gun was found, Davis was informed of his Miranda rights. He then signed a rights waiver form, but refused to make a statement. The officers ceased all questioning of Davis at that point.

While at the scene, the officers began typing up the arrest ticket. They then pulled over at a gas station to finish writing the arrest ticket. The officers opened the back window of the police vehicle to allow Davis to get some air. At the gas station, Davis saw a man in a wheel chair who he apparently recognized. Davis told the man in the wheelchair, "tell my girlfriend I'm going away for a long time." This statement was spontaneously uttered by Davis, and was not made in response to any police interrogation. A few minutes later, during the ride to the police station, Davis asked Officer Chapman what sort of charges he was facing. Officer Chapman responded that it depended on whether the gun was stolen. Davis stated that the gun was not stolen and had been given to him by a friend.

Davis was taken to 201 Poplar to be booked and processed. On January 31 and February 1, while in custody there, Davis made thirty-three telephone calls. Several of these calls were made to

[1]This is the handgun shown in the photograph at Exhibit 1.

a female, during which Davis made statements regarding his arrest and the firearm that was found. These calls were recorded by the jail, pursuant to the jail's telephone recording policy. The "free" telephones available to detainees have a written warning which state as follows:

> The Shelby County Division of Correction reserves the authority to monitor or record conversations on this telephone. Your use of institutional telephones constitutes consent of this monitoring or recording. A properly placed telephone call through your counselor or to an attorney will not be monitored or recorded.

This warning is written in all capital letters, appears in Spanish next to the English version, and appears on the front of the "free" telephones. Although the warnings may at times be removed by detainees at the jail, the warnings on the phones are periodically checked by jailers and replaced if damaged. According to Captain Hammonds, the warnings have been on the phones since at least 2005.

In addition, detainees who are expected to remain in custody at the jail for more than a short period of time have access to telephones at the jail that require payment. In addition to the written warnings on these phones regarding the calls being recorded or monitored, these "pay" phones play a pre-recorded message at the beginning of each call, verbally warning the caller that the call is being recorded. Also, detainees who remain in custody for more than a brief period receive copies of the Inmate Handbook. In the handbook, under the Telephones Section, (Ex. 5, p. 9), inmates are notified that "All calls are monitored." Davis received and signed

for a copy of the Inmate Handbook on February 1, 2011. However, it is unclear whether Davis received the Inmate Handbook before or after he made the phone calls at issue in this motion. For purposes of this motion, the court will assume that Davis signed for and received the handbook after making the recorded calls.[2] At the hearing, the government stipulated that Davis only used the "free" phones on January 31 and February 1, 2011, while at 201 Poplar. He did not make any telephone calls from the "pay" phones, and therefore none of his telephone calls had the pre-recorded warning message.

Also at the hearing, the government presented evidence that Davis was convicted in 2005 in Criminal Court of Shelby County for Theft of Property over $10,000 (a felony), and his criminal judgment shows that he received pretrial jail credit of 270 days in custody. (Ex. 7.) Davis was also convicted in Criminal Court of Shelby County for Unlawful Possession of Cocaine (a felony), and his criminal judgment shows that he received pretrial jail credit of 338 days in custody. The court finds that during both of these previous periods of incarceration, Davis was detained during a portion of that time at 201 Poplar, and that the phones available for use at 201 Poplar displayed warning messages about the

[2]At the June 13 hearing, Ms. Webber stated that the government intended to use recordings of only three of Davis's telephone calls during its case-in-chief. Those calls were made at 12:52:05 a.m., 1:09:52 a.m., and 8:48:12 a.m. on February 1, 2011.

recording policy. Additionally, Davis would have received copies of the Inmate Handbook (containing the details of the recording policy) during both of these periods of incarceration. Moreover, any calls made at the "pay" phones by Davis during his previous time in custody would have included an audio message notifying him that the call would be monitored and recorded.

In his Motion to Suppress Evidence, Davis argues that the three statements he made to the police during the course of his arrest and transport to 201 Poplar should be suppressed, because they were obtained in violation of his Fifth Amendment rights.[3] First, Davis argues that his statement to Officer Chapman about his attempt to sell three crack rocks was made in response to custodial interrogation, but prior to the issuance of a Miranda warning. Second, Davis argues for suppression of his statement to the man in the wheelchair that he would be "going away for a long time." Third, Davis argues that his statement about whether the gun was stolen was made after he had already invoked his right to silence, and therefore should also be suppressed. Finally, Davis argues that the telephone calls he made at 201 Poplar should be suppressed because they were recorded without his consent, in violation of the Fourth Amendment and federal statutory law.

[3]Davis also made a statement to Officer Chapman that he was on parole for auto theft and drug charges. The government stated at the hearing that it would not use this statement at trial during its case-in-chief. Therefore, the court need not address this statement in this report and recommendation.

In regard to Davis's first statement (about the crack rocks), the government conceded at the hearing that this statement was made in response to custodial interrogation without Davis being first advised of his Miranda rights. The government argues, however, that the public safety exception applies. The government also asserts that Davis's second statement (to the man in the wheelchair) was voluntary and spontaneous, so there is no basis for its suppression. The government further contends that Davis's third statement (about the gun) did not violate the Fifth Amendment because he waived his previously invoked right to silence by voluntarily asking a question, and Officer Chapman was merely responding to that question, as opposed to conducting custodial interrogation. Finally, in regard to the recorded telephone calls, the government argues that Davis was fully aware that his calls would be recorded due to his prior periods of incarceration, and that he was given adequate notice of the recordings via the posted warning placards and the Inmate Handbook.[4] Therefore, the

[4]Due to issues with the third-party vendor who provides telephone recording services to the SCSO, the government was not able to provide any evidence as to whether or not Davis's telephone calls on January 31 and February 1 contained the pre-recorded warning message at the beginning of those calls. For this reason, the government stated at the June 12 hearing that it would not rely on the presence of audio warnings as a basis for its argument that Davis was aware of the recording policy at 201 Poplar. The government's position is that the warning placards, the Inmate Handbook, and Davis's history of incarceration, are sufficient bases to establish his consent to having his calls monitored and recorded.

government argues that no statutory or Fourth Amendment violation occurred.

II. PROPOSED CONCLUSIONS OF LAW

A. Statements Made by Davis Prior to His Arrest

The court will first address whether Davis's statement to the police before he was issued a Miranda warning should be suppressed. As stated earlier, after Davis was handcuffed and placed by Officer Chapman in the backseat of his police car, Officer Chapman asked Davis why he was running. Davis responded by stating that he was trying to sell three crack rocks for $15.00.

> "The Fifth Amendment guarantees that 'no person . . . shall be compelled in a criminal case to be a witness against himself.'" In Miranda v. Arizona, 384 U.S. 436 [], the Supreme Court extended the protection against compulsory self-incrimination to individuals in police custody. "As a general rule, when a defendant is in custody, law officials must give him appropriate Miranda warnings before interrogation begins; otherwise, any statements resulting from the police interrogation will be inadmissible unless the defendant clearly and intelligently waived his rights." Custody and interrogation are therefore the two "prerequisites to the triggering of Fifth Amendment privileges." For a defendant's statements during a custodial interrogation to be admissible, the government must demonstrate by a preponderance of the evidence that the defendant waived his Miranda rights prior to questioning.

United States v. Kellogg, 306 F. App'x 916, 922 (6th Cir. 2009) (internal citations omitted).

However, one exception to this rule is the public safety exception, which exists to allow police officers to "neutralize [a] volatile situation." New York v. Quarles, 467 U.S. 649, 655

(1984). Under the public safety exception, custodial interrogation is permitted "when officers have a reasonable belief based on articulable facts that they are in danger." United States v. Bell, 343 F. App'x 72, 74 (6th Cir. 2009) (quoting United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007)). The subjective motivation of the arresting officers during the interrogation does not affect the application of the exception. Quarles, 467 U.S. at 655-56. In addition, questions "designed solely to elicit testimonial evidence from a suspect" should be distinguished from questions "necessary to secure [the safety of the officers] or the safety of the public." Id. at 658-59.

To determine whether the public safety exception applies, the court must consider the "known history and characteristics of the suspect, the known facts and circumstances of the alleged crime, and the facts and circumstances confronted by the officer when he undertakes the arrest." Williams, 483 F.3d at 428. There are two conditions that must be satisfied in order for the public safety exception to apply. The officer must have reason to believe that: (1) the defendant possesses or may have recently possessed a weapon, and (2) the defendant or a third party other than the police may take control of the weapon and cause harm to others with it. Id. The public safety exception does not apply if "context-specific evidence rebuts the inference that the officer reasonably could have perceived a threat to public safety." Id.;

see also Kellogg, 306 F. App'x at 925 (declining to apply the public safety exception where the defendant was questioned about both a gun and drugs and no immediate threat to public safety existed); United States v. Lewis, No. 08-20028, 2008 WL 4849910, at *6 (W.D. Tenn. Nov. 6, 2008) (applying the public safety exception when officers investigated a drug complaint, potential gang members were present at the scene, and one of the officers thought he saw ammunition for a gun).

The court submits that Davis's statement about the crack rocks should be suppressed. As recently explained by the Supreme Court:

> [i]n determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of "the objective circumstances of the interrogation," Stansbury v. California, 511 U.S. 318, 322–323, 325 [] (1994) (per curiam), a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 [](1995).

Howes v. Fields, 132 S. Ct. 1181, 1189 (2012). The court further stated that "whether an individual's freedom of movement was curtailed . . . is simply the first step in the analysis," and that a court must also consider "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda." Id. at 1189-90.

Davis had not been read his Miranda rights prior to being asked by Officer Chapman why he ran. Up to that point, he had been chased by the police, placed in handcuffs, put in the backseat of a police

car, and was not free to leave the scene. At the hearing, the government conceded that Officer Chapman's question to Davis about the reason he ran constituted custodial interrogation. The court therefore finds that Officer Chapman was required to advise Davis of his Miranda rights prior to questioning him in the police car.

The court also finds that the public safety exception does not apply because the second prong of the Williams test is not satisfied. See Williams, 483 F.3d at 428. The court finds credible Officer Chapman's testimony that he reasonably believed that the shiny object thrown by Davis could have been a weapon. However, the court finds that the officers did not have a reasonable belief that a third party could have taken control of the potential weapon and caused harm to others. Officer Chapman knew the location of the shiny object because he watched Davis throw it. There was no evidence presented at the hearing that anyone else was in the same vicinity as where the object was thrown. In fact, the officers were able to quickly retrace Davis's flight path and recover the gun, without any assistance from Davis. The question asked by Officer Chapman regarding Davis's motive for running did not reasonably relate to any public safety concern. Davis's statement about the three crack rocks should therefore be suppressed.

B. Davis's Statement to the Man in the Wheelchair

The court will next address Davis's statement to the man in

the wheelchair during transport to 201 Poplar. Although statements made in response to custodial interrogation in violation of Miranda are generally excluded as evidence, "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." Miranda, 384 U.S. at 478. Statements made by a defendant that are not the product of custodial interrogation do not implicate Fifth Amendment rights. Id.; see also United States v. Montano, 613 F.2d 147, 149 (6th Cir. 1980). Davis's statement to the man in the wheelchair was not made in response to police questioning. Rather, he volunteered his statement to a third party without any prompting or coercion. The court submits that this statement was not procured in violation of Davis's Fifth Amendment rights and should therefore not be suppressed.

C. Statements Made by Davis During Transport to 201 Poplar

"[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). The Supreme Court established that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 436.

A suspect may invoke the right to remain silent only by an unambiguous statement to that effect. Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010). "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" Michigan v. Mosley, 423 U.S. 96, 104 (1975).

However, when a suspect invokes his right to silence but later re-initiates conversation with officers, the suspect may be found to have voluntarily waived his earlier invoked right to silence. As explained by the Sixth Circuit, authorities may speak to a defendant who had previously invoked his Miranda rights if the defendant has "evinced a willingness to discuss the investigation without influence by authorities," and "the totality of the circumstances indicates that [defendant] knowingly and intelligently waived his rights to counsel and silence." Davie v. Mitchell, 547 F.3d 297, 305-06 (6th Cir. 2008); see also Oregon v. Bradshaw, 462 U.S. 1039, 1044-46 (1983); Edwards v. Arizona, 451 U.S. 477, 486 n.9 (1981) (A court must determine "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.").

Moreover, courts have found that the requirement that a "significant period" of time pass between a defendant's invocation of his right to silence and a second round of questioning is not applicable to a situation in which the police discontinue questioning and the defendant subsequently initiates a confession. See, e.g., United States v. Alexander, 447 F.3d 1290, 1294 (10th Cir. 2006) (Mosley time limits inapplicable "if the suspect, and not the police, reinitiates contact and agrees to questioning"); Henderson v. Singletary, 968 F.2d 1070, 1071 (11th Cir. 1992) ("It does not make sense to apply the same time standard to situations in which the defendant controls the time period between the end of police questioning and the start of a defendant-initiated confession."); see also Davie, 547 F.3d at 323 (Cole, J., concurring) (citing Henderson and Alexander).

In this case, after receiving his Miranda warning, Davis stated that he did not wish to make a statement, thereby invoking his right to silence. There is no evidence that the right was not scrupulously honored by the arresting officers. At that point, all questioning of Davis ceased, and he remained in the back of the police car and was transported to the station. During the ride to the station, Davis spontaneously and voluntarily asked Officer Chapman what charges he would be facing. Officer Chapman responded that it would "depend on whether the gun was stolen," to which Davis replied that the gun was not stolen, but had been given to

him by a friend. There is no evidence that the officer did anything to prompt the discussion.

Davis's initiation of the discussion with Officer Chapman evinced a willingness to talk about the subject matter of the investigation, thereby satisfying the first requirement of Bradshaw. The short time between his invocation of his right to silence and the incriminating statement has little bearing on this inquiry due to the fact that Davis, not Officer Chapman, initiated the discussion. The totality of the circumstances also indicate that Davis knowingly and intelligently waived his right to silence. There is no evidence of intimidation, coercion, or deception by Officer Chapman. Davis was made aware of his Miranda rights upon his arrest, and there is no evidence that Davis did not fully understand those rights. Moreover, the fact that Davis has at least two prior felony convictions strongly suggests that he was aware of his Miranda rights. Therefore, Davis's subsequent waiver of his right to silence, by initiating the discussion with the officer, was both knowing and intelligent, and thus his subsequent statement to Officer Chapman was not made in violation of his Miranda rights.

D. Recorded Phone Calls Made by Davis at 201 Poplar

Lastly, Davis contends that the telephone calls he made while detained at 201 Poplar were illegally recorded in violation of his rights under the Fourth Amendment and "federal law criminalizing the

monitoring and recording of telephone conversation without a judicial order." The applicable federal law that Davis implicitly refers to is Title III of the Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq., which generally prohibits the intentional interception of telephone calls without judicial authorization. Recordings of unauthorized intercepted telephone calls may not be used as evidence at trial. See 18 U.S.C. § 2515. However, Title III excepts certain communications from its provisions, including communications intercepted through "any telephone or telegraph instrument, equipment or facility, or any component thereof . . . being used by . . . an investigative or law enforcement officer in the ordinary course of his duties," id. at § 2510(5)(a), and communications in which one of the parties has either expressly or impliedly consented to interception, id. at § 2511(2)(c).

The Sixth Circuit, as well as numerous other courts of appeals and district courts, has held that routine monitoring and recording by law enforcement of inmate telephone calls does not violate Title III. See United States v. Paul, 614 F.2d 115, 117 (6th Cir. 1980); see also United States v. Gangi, 57 F. App'x 809, 813-14 (10th Cir. 2003); United States v. Friedman, 300 F.3d 111, 121-22 (2d Cir. 2002); United States v. Van Poyck, 77 F.3d 285, 292 (9th Cir. 1996); United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989); United States v. Lewis, No. 02–20449, 2011 WL 6826663, at *2-3 (W.D. Tenn. Dec. 1, 2011); United States v. Doyle, No. 06 CR 224, 2007 WL

707023, at *1-2 (E.D. Wis. Feb. 16, 2007); United States v. Muse, No. 2:05 CR 118, 2006 WL 581245, at *2 (S.D. Ohio Mar. 7, 2006); United States v. Correa, 220 F. Supp. 2d 61, 63-65 (D. Mass. 2002); United States v. Hammond, 148 F. Supp. 2d 589, 590-91 (D. Md. 2001); United States v. Noriega, 764 F. Supp. 1480, 1490-92 (S.D. Fla. 1991); see generally Cook v. Hills, 3 F. App'x 393 (6th Cir. 2001). These courts opine that either § 2510(5)(a)'s "law enforcement" exception or § 2511(2)(c)'s "consent to interception" exception, or both, apply to the recording of inmate calls. See Van Poyck, 77 F.3d at 292. In addition, such recordings generally do not violate an inmate's Fourth Amendment rights because "any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls." Id.; see also Gangi, 57 F. App'x at 815; Friedman, 300 F.3d at 123; Lewis, 2011 WL 6826663, at *4; Doyle, 2007 WL 707023, at *2.

The present case is similar to Doyle. In that case, the defendant made numerous calls from the jail where he was confined, which were recorded by jail personnel and provided to the government. The court noted that the jail, with the exception of calls between an inmate and his lawyer, recorded all inmate calls consistent with jail rules and regulations. Id. at *1. In addition, inmates at the jail were notified of this recording policy in several ways:

> First, at the beginning of each call, an audio message states that the call will be recorded and is subject to monitoring at any time. Id. ¶ 6. Second, printed warnings in both English and Spanish are posted next to the phones used by inmates, stating that the jail reserves the authority to monitor and record calls and that an inmate's use of the phones constitutes consent to monitoring and recording. Id. ¶ 7. Third, upon being received into the jail, inmates receive a copy of the jail's rule-book, of which they must acknowledge receipt, including an acknowledgment that all calls except those to counsel will be recorded. Defendant received and signed for the rule-book. Id. ¶ 8. Finally, defendant received a document explaining how the phone system at the jail worked, which again stated that phone calls, other than to attorneys, made from the inmate phone system are recorded. Id. ¶ 9.

Id. In denying defendant's motion to suppress the recordings, the Doyle court held that "where, as here, a jail provides notice that calls will be monitored, there is no reasonable expectation of privacy in such communications." Id. The court further held that the law enforcement exception applied because the jail recorded inmate calls automatically pursuant to an established policy and that the consent exception applied because the defendant received several warnings that his calls were subject to recording. Id. at *2.

In this case, the government witnesses testified that all calls made by detainees at 201 Poplar, with the exception of calls to counsel, are automatically recorded pursuant to jail policy that has been in effect for the past twelve years. The telephones available to the detainees display a written notice that warns the inmate that calls are subject to monitoring and recording. In addition,

detainees who are expected to remain at 201 Poplar for more than a short period of time are provided with an Inmate Handbook that informs detainees that "all calls are monitored." Davis would have received an Inmate Handbook during his previous periods of incarceration, and also would have been exposed to the warning placards on the telephones. Finally, the court finds significant Davis's criminal history. As stated earlier, Davis received over 600 days of pretrial jail credit stemming from two earlier criminal convictions. While the government has not presented evidence specifically showing that Davis made telephone calls during the time, the court finds that this is almost certainly the case, in light of the fact that Davis made thirty-three phone calls in the twenty-four hours he spent at 201 Poplar starting on January 31, 2011.

The court further finds that, while Davis may not have made a telephone call on January 31 or February 1, 2011 that contained a pre-recorded message regarding the recording policy, Davis would have heard this message on calls made on the facility's phones during his previous periods of incarceration. Applying the analysis set forth in the cases cited above, this court likewise concludes that the law enforcement and consent exceptions under Title III apply to the telephone calls at issue in Davis's Motion to Suppress.

Moreover, Davis did not have a reasonable expectation of privacy in these telephone calls that would create a potential

Fourth Amendment violation:

> A constitutionally protected right of privacy exists when a person has a subjective expectation of privacy that society is prepared to recognize as reasonable. Katz v. United States, 389 U.S. 347, 360–61 (1968) (Harlan, J., concurring). Inmates, however, have a substantially reduced right of privacy while incarcerated. Hudson v. Palmer, 468 U.S. 517, 527–28 (1984) ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates . . . to ensure institutional security and internal order."). Security and safety concerns provide a compelling reason to monitor or record an inmate's telephone conversations. United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996).

Lewis, 2011 WL 6826663, at *4. Davis's subjective expectation of privacy was further reduced because he proceeded to make calls despite warnings about the facility's recording and monitoring policy. Other courts confronted with the same issue have held "that defendants have no reasonable expectation of privacy in non-attorney telephone calls made from detention centers once a defendant has received notice of monitoring and recording of such calls." Id. (quoting United States v. Brown, No. 06–867, 2008 WL 5377755, at *2–3 (D.N.J. Dec. 18, 2008)); see also United States v. Solomon, No. 2:05–cr–385, 2007 WL 2702792, at *1 (W.D. Pa. Sept. 13, 2007); United States v. Plummer, No. 2:05–cr–336, 2006 WL 2226010, at * 6 (W.D. Pa. Aug. 2, 2006)). The recordings of Davis's telephone calls should therefore not be suppressed.

III. RECOMMENDATION

For the reasons above, it is recommended that Davis's Motion to Suppress Evidence be granted in part and denied in part.

Specifically, Davis's statement about his attempt to sell three crack rocks for $15.00 should be suppressed, as the statement was obtained in violation of Davis's Fifth Amendment rights. The motion should be denied in regard to his other challenged statements and his recorded telephone calls from 201 Poplar.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

July 6, 2012
Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.