IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 04-54 GMS
	)	
ANDRE MIGHTY,	)	
	)	
Defendant.	)	

MEMORANDUM

I. INTRODUCTION

On May 17, 2004, the Grand Jury for the District of Delaware indicted Andre Mighty ("Mighty") on two counts: (1) knowing possession of a firearm with a removed and/or obliterated serial number, in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B); and (2) knowing possession of a firearm by an alien illegally and unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2).

Presently before the court is Mighty's Motion to Suppress Evidence. The court held an evidentiary hearing in connection with this motion on September 22, 2004. Additionally, the court held oral argument on March 18, 2005. After considering the testimony elicited during the hearing, the arguments presented in the parties' submissions on the issues, and the parties' assertions during oral argument, the court will grant Mighty's motion.

II. FINDINGS OF FACT

At the evidentiary hearing, the United States called two Wilmington Police Department ("WPD") Detectives as its witnesses: Christian Flaherty ("Flaherty") and Steven Flood ("Flood"). The United States also introduced into evidence, without objection, an affidavit and application for a search warrant prepared by Flaherty. *See* Transcript of Hearing on Defendant's Motion to

Suppress ("Tr.") at 29; Government Exhibit 1 ("Ex. 1"). In the affidavit and application, Flaherty detailed his attempts to link Mighty to a maroon over grey Chevrolet Corsica ("Corsica") – that is, to establish probable cause to search the Corsica. Tr. at 21. At the hearing, Flaherty adopted the information in the affidavit and application as his testimony. *Id.* at 23. Mighty did not call any witnesses. After listening to the testimony of each witness, and observing the demeanor of each, the court concludes that Flaherty's and Flood's accounts of the facts are credible. Additionally, the court concludes that the facts presented in the affidavit and application are credible. The following represents the court's essential findings of fact as required by Rule 12(e) of the Federal Rules of Criminal Procedure.

On August 31, 2003, O'Neil Rose ("Rose") filed a report with the WPD, claiming that he was involved in an altercation with "Andre," an individual of Jamaican descent that he had known for approximately nine months. *See* Tr. at 27; Ex. 1 ¶ 6. According to Rose, he was attending a party in Wilmington, Delaware, when he encountered "Andre" (*i.e.* Mighty), who began to argue with him about an earlier fight. *See* Ex. 1 ¶¶ 4-5. Rose left the party and went outside to his car where he was confronted by Mighty, who produced a handgun and pointed it at Rose's head. *See id.* ¶ 5. Attempting to defend himself, Rose pushed the gun away from his face, to which Mighty responded by firing one shot that missed Rose. *See id.*

Rose provided the WPD with additional information regarding Mighty. On March 29, 2004, Rose contacted Flaherty to report that Mighty had recently left a business in the 2000 block of North Market Street, Wilmington. *See id.* ¶ 7. Rose accompanied Flaherty on a search of the area, but the two men failed to locate Mighty. *Id.* Rose, however, pointed to a black BMW and stated that

Mighty's brother owned the vehicle. Rose also stated that Mighty's brother owned a shop located at 2711 North Market Street. *Id.*

Flaherty conducted a motor vehicle registration check on the black BMW and a DELJIS complaint check on its owner, Earl Whyte ("Whyte"). The DELJIS complaint check returned a 2002 complaint in which Whyte's younger brother was identified as Mighty. *Id.* ¶ 8. Flaherty used this information to compile a photographic line-up featuring Mighty and five additional people that he presented to Rose. *Id.* On March 29, 2004, Rose positively identified Mighty from the photographic line-up. *Id.* Flaherty utilized the positive identification to obtain an arrest warrant for Mighty, on March 29, 2004, for the charges of reckless endangering first degree and possession of a firearm during the commission of a felony. *Id.* ¶ 9.

Flaherty then performed a criminal history check on Mighty. The criminal history check returned a Troop 2 Delaware State Police ("DSP") report from March 9, 2004, with Mighty as the defendant. *See id.* ¶ 10. The report, dated March 10, 2004, states that Mighty was involved in a fight with a co-worker named Fred Jackson ("Jackson"). *See id.*; D.I. 36, at 1. According to the report, on March 9, 2004, Jackson and Mighty were involved in a verbal argument during working hours and a physical altercation, in the front parking lot of Iron Mountain Company, after working hours. *See* D.I. 36, at 1. Mighty allegedly exited a motor vehicle and struck Jackson in the head with the butt of a handgun. *See id.* at 2. Jackson described Mighty's motor vehicle as a maroon Chevrolet Corsica. Ex. 1 ¶ 10. When interviewed by DSP Trooper Hevelow ("Hevelow") regarding the altercation, Jackson reported that Mighty had assaulted him with a handgun. *See* D.I. 36, at 2. Jackson asserted that Mighty pulled his vehicle into the front parking lot of the business and exited the vehicle holding a "small black semi-automatic handgun." *See id.* at 4. Jackson allegedly

attempted to push the gun away from Mighty by grabbing his arms. Mighty then allegedly struck Jackson in the head with the butt of the gun. *See id.* Hevelow searched Mighty's vehicle. *See id.* at 2. The report states that Hevelow "detected an odor of marijuana within the interior of the vehicle and later detected a heavy odor of . . . [marijuana] upon opening the vehicle trunk." *Id.* Hevelow, however, "was unable to locate a weapon or any contraband" in the vehicle. *Id.*

Mighty's criminal check also showed an address of 1502 North Clayton Street. Ex. 1 ¶ 11. Flaherty searched the area for the Corsica but did not find the vehicle. *Id.* In addition, none of the vehicles located on the 1500 block of North Clayton Street were registered to 1502 North Clayton Street. *Id.*

On March 29, 2004, Flaherty observed the Corsica in the 2700 block of North Market Street. *Id.* ¶ 12. Flaherty conducted a DELJIS motor vehicle registration inquiry on the Corsica, which showed the owners to be Lashea Reams and Taisha Hawkes, of 23 Cunard Street, Wilmington. *See id.* Flaherty also conducted a DELJIS license inquiry on Taisha Hawkes, which returned an address of 1502 North Clayton Street, the same address as Mighty's. *See id.*

On March 30, 2004, Flaherty, maintaining surveillance, observed Mighty exit the business on 2711 North Market Street, speak to the driver of a Honda Accord ("Accord"), and drive away in the Corsica. *Id.* ¶ 13. Flaherty followed the Corsica until it parked in the 600 block of Homestead Road in Alban Park. The Accord also entered the block and parked behind the Corsica. *See id.* Mighty exited the Corsica, but Flaherty could not determine which residence Mighty entered. *See id.* Flaherty conducted a DELJIS motor vehicle registration on the Accord, which showed that Lashea Reams and Alexander Bennet, of 27 Cunard Street, were the registered owners. *See id.*

Flaherty maintained surveillance on the Corsica. He observed it parked in the 600 block of Homestead Road, between the addresses of 620 and 638, on March 31, 2004. *Id.* ¶ 14. On April 1, 2004, he observed the Corsica parked in the 2700 block of North Market Street. *See id.* ¶¶ 14-15.

On April 1, 2004, Flaherty performed a motor vehicle check for all vehicles registered to Lashea Reams. The check returned a third vehicle, a 1993 Saturn, registered to 632 Homestead Road. *See id.* ¶ 16. This address is within the same block that the Corsica and Accord were parked on March 30, 2004, and the Corsica was parked on March 31, 2004. *Id.*

Flaherty recorded the above information in an affidavit to support his application for a search warrant of the Corsica, the body of Mighty, and his residence. *See* Ex. 1. The affidavit and application were not presented to a magistrate. Flaherty, therefore, did not obtain a search warrant.[1]

On April 20, 2004, at approximately 11:10 a.m., Flaherty was conducting surveillance with Flood and Alcohol Tobacco and Firearms ("ATF") Special Agent Ronnie Hnat ("Hnat") in the 2700 block of North Market Street. Tr. at 4-7. From his unmarked police car, he observed the Corsica legally parked along the 2700 block.[2] He also observed Mighty at a bus stop between 2711 North Market Street and the corner of Twenty-Eighth and North Market Street. *Id.* at 7-10. Flaherty did not effect an arrest when he first noticed Mighty because he wanted to have uniformed police

[1] At the time of Mighty's arrest, Flaherty believed that Mighty resided at 632 Homestead Road, Alban Park, but had not yet completed his investigation. Tr. at 15. Flaherty testified that he did not obtain the search warrant only for the Corsica because he was "going for both the vehicle and the house," and wanted to complete his investigation of the Homestead Road residence before obtaining a warrant. *Id.* at 40.

[2] Although Flaherty had seen Mighty driving the Corsica on prior occasions, no one had seen Mighty driving the vehicle on April 20, 2004. Tr. at 33.

officers at the scene.[3] *Id.* at 9. He radioed the WPD for assistance and waited approximately ten minutes for a marked vehicle to arrive. Tr. at 9. While Flaherty waited for the WPD to arrive, he observed Mighty, who was alone, walking back and forth between the bus stop and the restaurant. *Id.* at 10. After the WPD arrived, Flaherty pulled his vehicle in front of the bus stop and Flood, the passenger, exited the vehicle and took Mighty into custody without incident.[4] *Id.*

The WPD officers assisted in the patdown of Mighty and removed a key chain containing keys from his pocket.[5] *Id.* at 11. Flaherty took possession of the key chain and noted that there were two obvious vehicle keys. *Id.* at 13. After Flaherty took possession of the keys, Whyte, Mighty's brother, approached Mighty and two began speaking with Jamaican accents. *Id.* at 16. Flaherty could not understand what they were saying, but observed Mighty looking up the street in the direction of the Corsica, which was parked on the same side of the street as the Jamaican restaurant, three car lengths and a driveway away from the restaurant. *Id.* at 13-16. Flaherty immediately walked over to the Corsica and tried what he believed was the ignition key in the door. *Id.* at 13. The key locked and unlocked the door. *Id.* at 13-14. Flaherty observed that the windows on the driver's side and passenger side of the Corsica were rolled down, and both doors were unlocked. *Id.* at 15. He did not observe any weapon in the Corsica. *Id.* at 20. After determining that the keys fit the Corsica, Flaherty instructed Flood to transport the vehicle into the WPD, where they would

---

[3] Flaherty testified that he wanted a marked vehicle present because he was familiar with 2700 block of North Market Street, having worked in the police district which includes that block. Tr. at 10. According to Flaherty, it was a high crime area in which shootings and drug dealings had occurred. *Id.* at 9. Flaherty also had heard the possibility that drugs or guns could be present inside 2711 North Market Street. Tr. at 10.

[4] While the arrest was without incident, Flood testified that he had to ask Mighty three or four times if his name was "Andre" before Mighty responded in the affirmative. Tr. at 46.

[5] The WPD officers did not find any weapons on Mighty's person. Tr. at 11.

secure it until Flaherty presented his application for a search warrant to a magistrate.[6] *Id.* at 14, 17, 57.

Mighty was then transported to the WPD from the arrest scene by the marked WPD car. Flaherty followed the patrol car in his unmarked car. Flood, in the Corsica, got behind Flaherty, and the cars formed a caravan to the WPD headquarters. Tr. at 17-18. When Flood entered the vehicle, he found that he could not drive it because the seat was positioned in such a way that he was unable to properly use the pedals. *Id.* at 49. Flood, therefore, lifted the seat up and moved it forward. *Id.* at 48. While Flood was adjusting the seat, his arm hit the center console, which he noticed was not latched. *Id.* After starting the ignition, Flood again observed that the center console was not shut and looked down at it. *Id.* He further noticed a one and one-half to two inch piece of material hanging out of the front corner of the console, which appeared to him to be the end of a soft holster – a soft dark material with stitch marks. *Id.* at 48, 58-59. Flood then opened the center console and identified the material as a holster. *Id.* He also determined that if the holster contained a gun, the barrel would be facing him, so he attempted to move the holster. *Id.* at 48, 50. When Flood touched the end of the holster, a gun fell out of the bottom of the holster and into the console. *Id.* at 48, 52. He adjusted the gun so that the barrel wasn't pointing toward him and advised Flaherty that there was a gun in the vehicle. *Id.* at 48. Flood then drove the vehicle back to WPD headquarters. *Id.*

Mighty gave a video taped confession at WPD headquarters after being interviewed by Flaherty for approximately one and one-half hours. *Id.* at 74-75.

---

[6] Flaherty did not have a warrant to search the Corsica at the time of Mighty's arrest. Although he testified that it would only take approximately ten minutes to secure a warrant, by driving to and from the Justice of the Peace Court, Flaherty wanted to search the vehicle at the WPD headquarters because, as previously discussed, he considered the 2700 block of North Market Street a "high crime" area. Tr. at 41-42.

III. DISCUSSION

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " U.S. CONST. amend. IV. "[A] search conducted without a warrant issued upon probable cause is *per se* unreasonable subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Although the burden of proof in a motion to suppress is ordinarily on the defendant, *Rakas v. Illinois*, 439 U.S. 128, 130 n. 1 (1978), in a warrantless search case, the Government bears the burden of establishing that the search falls within one of the warrant exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In the present case, Mighty alleges that the warrantless search of the Corsica violated the Fourth Amendment prohibition against unreasonable searches and seizures because no valid exception applies. Conversely, the Government contends that the search of the Corsica was lawful for two reasons: (1) Flaherty had probable cause to search the Corsica pursuant to the automobile exception to the warrant requirement; and (2) the search of the Corsica was incident to the lawful arrest of Mighty, a recent occupant of the Corsica.[7] For the reasons that follow, the court concurs with Mighty's viewpoint, and concludes that the search of the Corsica violated the Fourth Amendment.

A. Automobile Exception to the Warrant Requirement

[7] At the September 22, 2004 evidentiary hearing, the United States indicated that it was going to argue that the officers secured the Corsica in a reasonable manner pending a search warrant, and that Flood discovered the gun as he was driving because it was in his plain view. *See* Tr. at 28-29. The United States, however, did not address this argument in either its post-hearing briefing or during the March 18, 2005 oral argument. As such, the court finds that the United States has abandoned this argument and the court, therefore, will not address it.

The automobile exception to the warrant requirement permits "warrantless searches of any part of a vehicle that may conceal evidence . . . where there is probable cause to believe that the vehicle contains evidence of a crime." *United States v. Ross*, 456 U.S. 798, 809-09 (1982). The rationale for a warrantless search of an automobile is two-fold: (1) a person has a lower expectation of privacy in his car than he does in his home, *California v. Carney*, 471 U.S. 386, 391 (1985); and (2) cars are readily mobile and "create[] circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

In the present case, the United States argues that the detectives had probable cause to believe that the gun seized was in the Corsica. The defendant, on the other hand, argues that the search of the Corsica violated the Fourth Amendment because the information used to establish probable cause was stale. The Supreme Court has described probable cause as existing "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). In order to determine whether the detectives in a specific case had probable cause to conduct a warrantless search, the court must look to the totality of the circumstances and then determine whether, given all the facts, there was "a fair probability that contraband or evidence of a crime" would be found in the place to be searched. *Illinois v. Gates*, 426 U.S. 213, 238 (1983); *Carroll v. United States*, 267 U.S. 132, 162 (1925).

The Supreme Court has refused to articulate precisely what "probable cause" means because it is not possible. *See Ornelas*, 517 U.S. at 695; *Gates*, 462 U.S. at 231. However, the Court has set forth the principle components of a probable cause determination. These include "the events

which occurred leading up to the stop or search and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause." *Ornelas*, 517 U.S. at 696. In this two-part analysis, the court must first determine the historical facts. The court then must determine "whether the facts satisfy the . . . [relevant constitutional] standard" – that is, "whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see Ornelas*, 517 U.S. at 696-97 (quoting *Pullman-Standard*, 456 U.S. 273 (1982)). The totality of the circumstances approach allows officers to draw on their experience and expertise when making inferences regarding the information available to them. *See United States v. Arvizu*, 534 U.S. 266, 273-74 (2002).

Additionally, the Third Circuit has based findings of probable cause on circumstantial evidence, including the age of the information that was available to the officer. *See United States v. Williams*, 124 F.3d 411, 420 (3d Cir. 1997) ("The age of the information . . . is a factor that must be considered in determining probable cause.") As the Third Circuit has reasoned, "[i]f information is too old, it may have little value in showing that contraband or evidence is still likely to be found in the place [to be searched]. The likelihood that the evidence sought is still at the place to be searched depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched." *Id.* (citing *United States v. Tehfe*, 722 F.2d 1114, 1119 (3d Cir. 1983), *cert. denied sub nom., Sanchez v. United States*, 466 U.S. 904 (1984)). For example, when the nature of the crime is"protracted and continuous," staleness may not be an issue. That is, "when the criminal activity has been going on continuously for *years*, staleness is less of a concern." *Williams*, 124 F.3d at 420 (emphasis added) (citation omitted) (holding that a warrant

authorizing the search of a residence was not based on stale information when the criminal activity, a gambling operation, began in the 1960's and continued through the 1990's because the activity was of a long and continuous nature.) With these standards and variables in mind, the court will consider whether the search of the Corsica that yielded the gun was supported by probable cause.

The Government argues that the search of the Corsica was based on probable cause because the information that was available to Flaherty was not stale. The Government bases its staleness argument on the continuous nature of Mighty's crimes, the nature of the item to be seized, *i.e.* a gun, and the place to be searched. The Government also relies on Flaherty's experience and expertise. The court will address each of these factors in turn.

1. The Nature of Mighty's Criminal Conduct

The United States asserts that Mighty engaged in a continuous course of conduct, therefore, making the age of Flaherty's information less significant and weighing in favor of a finding of probable cause. To support its assertion, the Government states that Mighty committed two weapon offenses. The first was committed on August 31, 2003, when, as previously discussed, Mighty allegedly fired a shot from a handgun at Rose, and the second committed on March 9, 2004, approximately six months and one week later. The Government also relies on *Williams*, and *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972). The court is not persuaded by the Government's argument, as *Williams* and *Johnson* are readily distinguishable from the facts of the present case.

The defendants in *Williams* were convicted for offenses related to the operation of an illegal gambling business. They appealed their convictions and challenged the denial of their motions to suppress. The Third Circuit was faced with the issue of whether the information used to establish probable cause to obtain a search warrant for a residence violated the Fourth Amendment because

it was stale and remote. *Williams*, 124 F.2d at 420. The defendants argued that the information contained in the warrant affidavit failed to demonstrate a nexus between the gambling operation and the residence searched. *Id.* The court disagreed, relying in part, on the continuous nature of the criminal activity involved. The court noted that the gambling operation began in the 1960's and continued through the 1990's, and held that "[i]n light of its long and continuous operation, staleness . . . [was] less important in the probable cause analysis." *Id.*

Likewise, *Johnson* is distinguishable on its facts. In *Johnson*, the defendant was convicted of selling and conspiracy to possess and sell non-taxpaid distilled spirits. *Johnson*, 461 F.2d at 286. The defendant appealed and argued that the facts supporting the warrant affidavit were too remote in time to satisfy the probable cause requirement. *Id*. at 287. The court, after considering the nature of the criminal activity, was not persuaded. The court reasoned "[w]here the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *Id.* The court then noted that the question in the case was "whether or not the Commissioner could have reasonably presumed the likelihood of a continuing violation," and held that "the facts supporting such a presumption were more than ample."[8] *Id.*

[8] Some of the facts supporting the presumption in *Johnson* include the following: (1) on or about August 2, 1970, an informant told an ATF agent that he had purchased whiskey from Mr. Johnson and that the whiskey was concealed in Mr. Johnson's garage; (2) on August 22, 1970, an undercover officer purchased whiskey; (3) Mr. Johnson had been convicted of possessing illicit whiskey in 1962; and (4) on or about September 30, 1972, a reliable informant told the affiant that Mr. Johnson was concealing non-taxpaid distilled spirits in his residence. *Id.* at 286.

In the present case, Mighty committed two isolated and unconnected weapon offenses approximately six months apart. Further, there is no evidence that Mighty was in the business of menacing people or selling and/or distributing guns.[9] In cases "where criminal activity is not inherently of such a [continuous] nature, the critical fact is likely to be that the conduct has been repeated on several occasions by the suspect. Time lapses running into weeks have been upheld when the facts tended to show probable cause established an ongoing illegal paramilitary operation, a large-scale continuing gambling operation, an ongoing forgery, fraud or loansharking operation . . . repeated sales of drugs or liquor or guns. . . ." 2 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(a), 377-78 (3d ed. 1996) (citations omitted) [hereinafter LAFAVE, SEARCH & SEIZURE]. When the facts of this case are compared to the cases cited in LaFave and by the Government, *i.e.* illegal gambling, fraud, sales of guns, and drug offenses, the court cannot agree that Mighty engaged in a course of conduct that was protracted and continuous.

2. The Nature of the Item to be Seized

The Government next argues that the nature of a gun is that it is not readily disposable, not likely to be consumed or destroyed and, therefore, militates against a finding of staleness and weighs in favor of probable cause. The Government relies on *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975), a case involving a bank robbery in which a search warrant was obtained to search for a revolver, ski mask, and bag of money. The Eighth Circuit in *Steeves* assumed for the purpose of discussion that the defendant had robbed the bank and conceded that three months after the robbery

[9] At oral argument, the United States conceded that Mighty was not in the business of menacing people or selling and/or distributing guns. *See* Transcript of Oral Argument on Defendant's Motion to Suppress ("Oral Argument Tr.") at 16-17, 29.

the money and money bag would no longer be present in the defendants home. *Steeves*, 525 F.2d at 38. However, the court explained that "the same concession cannot be made with respect to the revolver" because "people who own pistols generally keep them at home or on their persons." *Id.*

Other courts have held that offenders are likely to retain certain objects, including clothing and weapons, after committing a crime. *See, e.g.*, *United States v. Laury*, 985 F.2d 1293 (5th Cir. 1993) (holding that probable cause to search for a gun and clothing existed two months after a robbery); *United States v. Gann*, 732 F.2d 714 (9th Cir. 1984) (probable cause as to clothing and weapons three weeks after a bank robbery); *Sexton v. State*, 397 A.2d 540 (Del. 1979) (probable cause as to a gun, which the defendant kept for personal use, after one and one-half months had passed); *Blount v. State*, 511 A.2d 1030 (Del. 1986) (holding that probable cause existed as to a murderer's clothing and gun after ten days had elapsed). Courts have also stressed that guns are "not likely to be consumed or destroyed." LAFAVE, SEARCH & SEIZURE § 3.7(a), 385 (citations omitted). The court agrees.

As previously discussed, Mighty was not in the business of menacing or selling and/or distributing guns. Moreover, the investigating officers did not recover a handgun in either of Mighty's weapon offenses. Because guns are not likely to be consumed or destroyed and because Mighty possessed a handgun six months after his first weapon offense, the court finds that it was objectively reasonable for Flaherty to believe that Mighty had not disposed of the handgun in the forty-two days between the second weapon offense and his arrest.

3. The Place to be Searched

The Government next maintains that the record reflects the necessary link between Mighty and the place to be searched, noting that defense counsel conceded at the suppression hearing that

Mighty had a possessory interest in and operated the Corsica. The Government argues that the following factors, when considered as a whole, establish the link between Mighty and the Corsica: (1) Mighty's alleged assault on Jackson, which occurred after Mighty exited a vehicle, which Jackson described as a maroon Corsica; (2) Flaherty's March 30, 2004 observation of Mighty driving the Corsica from 2711 North Market Street to Homestead Road; (3) Mighty's possession of the Corsica keys when arrested; (4) Mighty's looks in the direction of the Corsica after being arrested and speaking to his brother; and (5) an absence of evidence at the scene of the arrest that anyone else expressed or demonstrated any possessory interest in the Corsica. (D.I. 21, at 8-9.) Additionally, the United States argues that the Corsica was searched only after Mighty had been patted down for weapons with negative results and it was, therefore, objectively reasonable for Flaherty to believe that if the handgun was not on Mighty's person, it was in the Corsica.

Professor LaFave is instructive on issues regarding probable cause to search a particular place, in that the question is "whether the facts at hand indicate '*present* probable cause.'" LAFAVE, SEARCH & SEIZURE § 3.7(a), 390. For example, "if it is determined that a particular person committed a robbery and then fled in his car on some prior occasion, it is virtually certain that on that date the gun used and the money taken in the robbery were in the car, but it is less certain that the gun and money were thereafter taken to the robber's residence. After the passage of some time, however, it will no longer appear probable that these items are still in the car used to remove them from the crime scene." *Id.* With these guidelines in mind, the court will examine the facts of the instant case.

The court will assume for purposes of this motion that Mighty had a possessory interest in the Corsica because he conceded this fact at the suppression hearing. However, implicit in the

court's analysis is the nexus between the object, *i.e.* the gun, and the place to be searched, *i.e.* the Corsica.[10] The court concludes that the Government has failed to establish a sufficient nexus between the gun and the Corsica. First, the Corsica only was involved in the alleged assault of Jackson; there was no car involved in the incident involving Rose. Second, and more important, the Corsica was searched on March 10, 2004, the day after the alleged Jackson assault. Hevelow, the officer that searched the Corsica, reported that he was "unable to locate a weapon or any contraband" after searching the interior and trunk of the vehicle. D.I. 36, at 2. Thus, even if an object-place nexus existed on March 9, 2004, it dissipated in light of the intervening search of Mighty's car on March 10, 2004. *See* LAFAVE, SEARCH & SEIZURE § 3.7(d), 430. The most current information available to Flaherty, therefore, was that although Mighty allegedly possessed a handgun on August 31, 2003, and allegedly possessed a handgun in the Corsica on March 9, 2004, a subsequent search of the Corsica, on March 10, 2004, produced no weapon. Based on these facts, the court finds that Flaherty, at most, had probable cause to believe that Mighty possessed a handgun. The facts available to Flaherty at the time of Mighty's arrest, however, illustrate that he did not have "present probable cause" to believe that the handgun was in the Corsica.

4. Officer Experience and Expertise

The Government, lastly, relies on Flaherty's experience and expertise in making its argument that Flaherty had probable cause to search the Corsica. The Government argues that the officer's experience and expertise is one part of the analysis to determine whether sufficient objective facts

[10] The Government must establish a nexus between the criminal activity, the item to be seized, and the place to be searched. LAFAVE, SEARCH & SEIZURE § 3.7(c), 412. In the present case, the court finds that the Government has established a sufficient nexus between the criminal activity and the gun because Mighty allegedly assaulted his victims with a handgun.

exist to provide probable cause, noting that the court must "examine the facts within the knowledge of arresting officers to determine whether they provide a probability on which reasonable and prudent persons would act." D.I. 21, at 11. The Government, however, fails to elaborate on Flaherty's experience and expertise in its briefing. A review of the record shows that Flaherty has been a sworn law enforcement officer since February 1998 with the WPD. Tr. at 4; Ex. 1 ¶ 1. He is specially sworn as a State of Delaware Detective. *Id.* At the time of Mighty's arrest, Flaherty was a Task Force Officer with the Operation Disarm Task Force ("Task Force"), focusing on investigating federal and state firearms offenses throughout the State of Delaware.[11] *Id.* Over the course of Flaherty's law enforcement career, he has participated in over 25 seizures of firearms, 30 search warrants for firearms, 95 investigations of firearms offenses, and 26 interviews of defendants who have relayed information regarding their firearms offenses. *Id.* ¶ 2. Based on his training, experience and personal knowledge, Flaherty testified that guns are commonly stored at a place where the purchaser has access, such as their residence or vehicle. *Id.* ¶ 18.

The court does not doubt Flaherty's expertise regarding firearms offenses. In fact, the court would agree that based only on his experience and expertise, Flaherty could reasonably conclude that Mighty kept his gun on his person, at his residence, or in his vehicle. That being said, an officer's experience and expertise is just one part of the court's probable cause analysis. The Government's ability to rest its argument for probable cause only on the testimony of an experienced police officer would undermine the totality of the circumstances analysis and would allow the

[11] Flaherty's work with the task force began in October 2003 and ended in approximately June 2004. Tr. at 4.

Government to establish probable cause in any case involving a firearm and a vehicle, no matter how remote the connection between the two.

In the present case, the facts within Flaherty's knowledge were not "sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime . . . [would] be found" in the Corsica. *Ornelas v. United States*, 517 U.S. 690, 696. As previously discussed, Flaherty knew that Hevelow search the Corsica on March 10, 2004 – the day after Mighty allegedly assaulted Jackson. Flaherty also knew that Hevelow did not find a weapon or contraband in the Corsica. Consequently, despite his acknowledged experience and expertise, Flaherty did not have probable cause to believe that Mighty had a gun in the Corsica. Accordingly, the automobile exception does not justify the warrantless search of the Corsica.

B. Search Incident to Arrest

The Government also argues that the search of the Corsica was a lawful search incident to Mighty's arrest. In a recent decision, the Supreme Court held that an officer can search the passenger compartment of a vehicle incident to the lawful arrest of a "recent occupant." *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127 (2004). In *Thornton*, an officer was following a Lincoln Town Car bearing tags issued to a different car. *Id.* at 2129. Before the officer could pull the defendant over, the defendant drove into a parking lot, parked, and stepped out of the vehicle. *Id.* The officer, pulling into the parking lot behind the defendant, saw him get out of the Town Car. *Id.* The officer then stepped out of his patrol car, accosted the defendant, and asked him for his driver's license. *Id.* The defendant consented to a pat down, which produced drugs. *Id.* The officer arrested the defendant and placed him into the back of the patrol car. *Id.* He proceeded to search

the defendant's vehicle and found a handgun under the driver's seat. *Id.* The defendant was convicted and appealed, asserting that the search of his vehicle violated the Fourth Amendment.

The Supreme Court affirmed his conviction, holding that even when a suspect exits a vehicle for reasons unrelated to the officer's presence, if the suspect is a "recent occupant" of the vehicle, the officer may search the passenger compartment incident to a lawful arrest. *Id.* at 2132. The Court noted that an arrestee's status "does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him." *Id.* The Court also noted that an arrestee's status as a recent occupant "may turn on his temporal or spatial relationship to the car at the time of the arrest and search." *Id.* at 2131.

The Third Circuit has not addressed the application of the Supreme Court's holding in *Thornton*. Courts of the Third Circuit, however, have addressed *Thornton*. Instructive is *Maiale v. Youse*, No. Civ. A. 03-5450, 2004 WL 1925004 (E.D. Pa. Aug. 27, 2004), in which the district court applied the "recent occupant" exception. In *Maiale*, the plaintiff was driving a silver Jaguar that was involved in a minor accident with another vehicle. *Id.* at * 1. Shortly after the accident, the occupants of the second vehicle flagged down an officer in his patrol car. *Id.* The occupants told the officer that a man in the Jaguar had pulled out a gun and threatened them. *Id.* At the same time, another officer received a radio call in which the caller reported a person with a gun. The two officers drove to Broad Street, the alleged location of the person wielding the gun, and observed the silver Jaguar in a gas station parking lot. *Id.* As one of the officers exited his vehicle, he observed the plaintiff, Mr. Maiale, standing next to the silver Jaguar and the plaintiff's passenger, Mr. Wood, walking away from the Jaguar toward the cashier's booth at the gas station. *Id.* In the same instant, another vehicle pulled into the gas station. The occupants of the vehicle exited, pointed at Mr.

Maiale and Mr. Wood and stated that they had a gun. *Id.* The officers conducted a patdown of Mr. Maiale, but found no contraband or weapons. *Id.* A patdown of Mr. Wood produced a gun. One of the officers then searched the Jaguar. *Id.*

Mr. Maiale filed a civil suit against the police officers, alleging that the search of the Jaguar violated his constitutional rights. The defendants contended that, under *Thornton*, the officer lawfully conducted the vehicle search incident to the arrest of Mr. Wood. *Id.* at * 3. The court agreed with the defendants, finding that the recent occupant exception applied. The court noted that the Supreme Court in *Thornton* "refused to define the term 'recent occupant.'" *Id.* at * 5. The court further noted that while the Supreme Court stated that an arrestee's status as a recent occupant may turn on his temporal or spatial relationship to the car, the Court never determined "how recent is recent, or how close is close." *Id.* (citing *Thornton*, 124 S.Ct. at 2131, 2140). Based on the record before it, the court first concluded that Mr. Wood had recently exited the Jaguar at the time he was searched. *Id.* at * 6. The court then concluded that "although the record is not clear as to the precise distance between [the] [p]laintiff's vehicle and Mr. Wood at the time that Mr. Wood was approached by [the] [o]fficer . . ., the court finds that Mr. Wood was in sufficiently close proximity to [the] [p]laintiff's vehicle at the time he was approached for the search of the . . . vehicle to be valid pursuant to *Thornton*. . . ." *Id.*

The Government contends, in its brief, that *Maiale* is important because the police officers who searched the Jaguar personally had never seen anyone inside or exiting the Jaguar. (D.I. 21, at 8.) The Government further contends that the instant case is analogous because the officers that arrested Mighty did not see him in the Corsica on the day he was arrested. The Government also maintains that it was objectively reasonable for Flaherty to conclude that Mighty, at the time of his

arrest, was a recent occupant of the Corsica. (*Id.*) At oral argument, however, the Government conceded that the weakness in its case was that "we can't put that guy in there. Had he been hanging out for two hours? An hour? Forty-five minutes? We don't know." Oral Argument Tr. at 38-39. Thus, the court concludes that the Government has conceded its inability to prove that Mighty was a "recent occupant" of the Corsica.[12] Accordingly, the search of the Corsica was not a search incident to Mighty's arrest.

Dated: April 26, 2005

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

[12] Even if the Government did not make such a concession, the court finds that the facts of the present case are distinguishable from the facts in *Thornton* and *Maiale*. First, the facts differ from *Thornton*, in that the officer who conducted the search of the defendant's car in that case had observed the defendant driving and exiting the car shortly before the defendant's arrest. Indeed, the officer followed the defendant into a garage and when the defendant exited the car the officer arrested him. The officers in the present case made no such observations.

Likewise, *Maiale* is distinguishable. The Government correctly states that the officers who searched the Jaguar in *Maiale* had personally not seen anyone inside or exiting the vehicle. However, the occupants of the vehicle involved in the accident with Mr. Maiale reported to the officer that a man in a Jaguar had a gun and threatened them. Additionally, the second vehicle pulled into the gas station after the officers had arrived and told the officers "they have a gun." In the present case, the record is completely bereft of evidence that anyone observed Mighty driving the Corsica on the day of his arrest. Thus, the Government is unable to temporally connect Mighty to the Corsica.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 04-54 GMS
	)	
ANDRE MIGHTY,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the court's Memorandum of this same date, IT IS HEREBY ORDERED that:

1. The defendant's Motion to Suppress Evidence (D.I. 15) is GRANTED.

Dated: April 26, 2005

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE