UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	*	
V.	*	Criminal No. 06-CR-00025-PB
[redacted], Defendant	*	

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE - UNLAWFUL SEARCH - SUNAPEE N.H.

NOW COMES the Defendant, [redacted], by and through his counsel, and respectfully moves this Court to suppress all evidence obtained as a result of the unlawful search of the Defendant's residence on January 13, 2006 by officers of the Sunapee Police Department.

IN SUPPORT OF THIS MOTION, the Defendant submits as follows:

1. The Defendant is charged, in a four count indictment, with possession of a firearm in furtherance of a drug trafficking crime contrary to 18 U.S.C. §924 (c); unlawful user of a controlled substance in possession of a firearm contrary to 18 U.S.C. §922(g)(3); possession with intent to distribute heroin contrary to 21 U.S.C. §841(a) and possession of a stolen firearm contrary to 18 U.S.C. §922(j).

2. The indictment is the result of an undercover investigation led by Police Officer Jon F. Stone of the Claremont, New Hampshire Police Department. Upon information and belief members of the Claremont Police Department or the Sullivan County Attorney's Office communicated with Sgt. Joseph Collins of the Sunapee Police

Department and requested that he make a search of the Defendant's residence at 209 Rte. 103, Sunapee, New Hampshire. The facts set forth herein are derived from the Affidavit of Susan [redacted], attached as Exhibit 1, and the Warrant and Application for Search Warrant and Supporting Affidavit authored by Sgt. Joseph Collins, attached as Exhibit 2.

3. On January 12 - 14, 2006, the residence at 209 Rte. 103 was the home of the following people: Susan [redacted], an adult, the Defendant, [redacted], an adult, and a juvenile, Schuyler C. . See attached, Affidavit of Susan [redacted].

4. On January 13, 2006, the Defendant was arrested and searched by members of the Claremont Police Department[1]. He was detained in lieu of bail at an arraignment which occurred in state court on January 13, 2006.

5. The Defendant's mother, Susan [redacted], spoke to members of the Sunapee Police department and the Sullivan County Attorney's Office at the arraignment. She was told that the younger children residing in her home were in danger from the possibility of coming into contact with heroin residue. Susan [redacted] was also told that it would be a crime for her remove anything that might be suspicious in her home. She was left with no choice but to contact Sgt. Collins and allow him into her home. See, Affidavit of Susan [redacted].

6. Sgt. Collins and Officer Rick Mastin arrived at the Deane residence at approximately 6 o'clock p.m. He did not have a warrant when he arrived. He asked if they could look around in [redacted] and Schuyler's bedrooms. They were permitted to

[1]The Defendant has also filed a Motion to Suppress Evidence based upon his warrantless and unreasonable seizure, arrest and search. See, Document 10.

walk through the rooms along with Susan [redacted]. Ms. [redacted]'s consent extended no further. See, Affidavit of Susan [redacted].

7. Collins did not obtain the consent of Brandon [redacted], a lawful resident of the home before looking around the bedrooms. See, Affidavit of Susan [redacted] and Application for Search Warrant.

8. Collins and Susan [redacted] dispute facts that occurred during the walk through. Collins claims that he saw a plastic baggy with white residue and a large amount of cash in Schuyler C.'s bedroom. Susan [redacted] denies this and states that the only visible money in that room was a single fifty dollar bill.

9. Collins claims that he obtained a bank withdrawal receipt in the amount of $6,400.00 in the course of the walk through. Susan [redacted] states that there was no conversation about bank receipt, that it was located in the computer room (not in Schuyler or [redacted] bedroom) and that she did not give Collins permission to seize the receipt. Susan [redacted] also points out that the receipt is not a withdrawal receipt as indicated by Collins but a deposit receipt. Further Ms. [redacted] will testify that the account pertaining to the receipt was and is owned by her and [redacted] as co-depositors. See, Letter from Sugar River Savings Bank attached as Exhibit 3. Collins asserts that the account is co-owned by the Defendant and Schuyler C. .

10. Sgt. Collins asserted in his Application for a Search Warrant that when he looked through [redacted]'s room he saw a lap top computer and two boxes of sandwich baggies. Ms. [redacted] asserts that both the lap top and the baggies were but were in the computer room and not in [redacted]'s room .

11. Finally and importantly, Ms. [redacted] asserts that the officers, without her

consent opened a hatch type door to an attic crawlspace and found what appeared to be drugs. Collins, according to Susan [redacted], replaced the items in the crawlspace and ordered her not to touch them - he would "do it right and get a search warrant." Collins Application and Affidavit is silent in this regard.

12. Collins subsequently prepared the attached Application for Search Warrant and Supporting Affidavit. Based upon Collins' affidavit Judge Cardello of the Newport District Court issued a search warrant.

LEGAL ARGUMENT

Susan [redacted]'s Alleged Consent Was Not the Product of a Free and Voluntary Choice

13. In order to satisfy the Fourth Amendment any consent to search must be the product of a free and voluntary choice. Schneckloth v. Bustamante, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968). The burden of proving that consent was freely and voluntarily given rests with the Government. Bumper at p. 548.

14. In this case consent was not freely and voluntary given but was offered as the result of implicit threats. The officers and the county attorney advised Ms. [redacted] that her children were at risk but at the same time advised her that she would commit a criminal act if she discarded any dangerous material from the home. This left her without a choice at all but with only one option - allow Sgt. Collins entry to the home.

15. Consent rendered through coercion, no matter how subtly applied is nothing more than a pretext for the very police intrusion against which the Fourth Amendment is designed to protect. Schneckloth at p. 228.

16. Any consent obtained in this case was not the product of a free and voluntary choice and therefore invalid. All evidence obtained as result of the consent search and the subsequent search pursuant to the warrant must be suppressed.

Sgt. Collins' Search Exceeded the Scope of Any Consent

17. "One of the specifically established exceptions to the [Fourth Amendment] requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); United States v. Melendez, 301 F.3d 27, 32 (1stCir. 2002). "A consensual search may not exceed the scope of the consent given." United States v. Turner, 169 F.3d 84, 87 (1stCir. 1999); see also, United States v. Melendez, 301 F.3d at 32.

18. "Warrantless searches may not exceed the scope of the consent given. The scope of consent is measured by a test of objective reasonableness: 'what would the typical reasonable person have understood by the exchange between the officer and subject?'" United States v. Marshall, 348 F.3d 281, 286 (1stCir. 2003); citing, Florida v. Jimeno, 500 U.S. 248, 251 (1991); see also, United States v. Melendez, 301 F.3d at 32. "The standard for measuring the scope of a search is one of objective reasonableness, not the consenting party's subjective belief." Id. at 287.

19. The consent given by Ms. [redacted] was limited to "looking around" the bedrooms occupied by Schuyler C. and [redacted]. No consent was given to seize any items such as the bank receipt. Similarly no consent was given to the officers to search in the attic crawlspace. Nonetheless the officers did so.

20. The Government will likely argue that the receipt seized by Sgt. Collins was

in plain view and therefore falling within an exception to the warrant requirement.

21. "The plain view doctrine authorizes the seizure and introduction into evidence of items found in plain view during a lawful search even though they are not included within the scope of the warrant." United States v. Caggiano, 899 F.2d 99, 103 (1st Cir. 1990); citing, Arizona v. Hicks, 480 U.S. 321, 326-27 (1987); see also, United States v. Giannetta, 990 F.2d 571, 578 (1990). "The plain view doctrine allows police to seize the object, even though it is not specified in the warrant, if two requirements are met. First, the police must have a prior justification for being in a position to see the item in plain view." United States v. Giannetta, 990 F.2d at 578; citing, United States v. Johnston, 784 F.2d 416, 419 (1st Cir. 1986). "Phrased another way, the police must not have exceeded the permitted scope of their search in uncovering the item." Id. Put yet another way, "an essential predicate to the seizure of evidence not within a warrant's purview is that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." United States v. Hamie, 165 F.3d 80, 82 (1st Cir. 1999); citing, Horton v. California, 496 U.S. 128, 136 (1990).

22. This same principle applies to consent searches. The police must not have exceeded the permitted scope of the consent search in uncovering the item to be seized. See, United States v. Turner, 169 F.3d 84, 87 (1st Cir. 1999); see also, United States v. Marquez, 337 F.3d 1203, 1207 (10th Cir. 2003) ("When law enforcement officers rely upon consent to justify a warrantless search, the scope of the consent determines the permissible scope of the search.") Sgt. Collins exceeded the scope of any consent search when he searched examined and seized the receipt which was not

in one of the areas for which consent to search was given.

23. The plain view doctrine offers no excuse, at all, for the intrusion into the attic crawlspace.

24. "Second, the incriminating nature of the item must be 'immediately apparent'." Id. A single bank receipt memorializing a deposit into a joint bank account does not have an incriminating nature which is immediately apparent. Therefore the search and seizure of the document violated the Fourth Amendment. .

25. "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." Horton v. California, 496 U.S. at 140.

26. The Sunapee officers exceeded the scope of the consent when they searched the computer room and seized the bank receipt and when they searched the attic crawlspace. Once the officers exceeded the scope of the consent they were in violation of the Fourth Amendment and any subsequent seizure of the items found, even if in compliance with a subsequently issued search warrant violates the Fourth Amendment. See, Id. Therefore all evidence seized as a result of the alleged consent search and subject to the warrant obtained by Sgt. Collins must be suppressed.

27. It is unlikely that Sgt. Collins would have even applied for a search warrant but for his unlawful search of the attic crawlspace which allegedly revealed drugs. Although this fact is not mentioned in his Application and Supporting Affidavit it should be noted that according to Collins he already had Ms. [redacted]'s consent to search.

Therefore, a warrant would be unnecessary. However recognizing that he had already exceeded the scope of any consent he decided to "do the right thing" and get a warrant.

28. In determining whether the warrant is no more than window dressing for an already illegal search the court must make a factual determination as to the police officers' intent. The district court is not bound by after-the-fact assurances of an officer's intent, but instead must assess the totality of the attendant circumstances to ascertain whether those assurances appear plausible. United States v. Dessesaure, 429 F.3d 359, 369 (1st Cir., 2006). This situation is unlike the facts in Dessesaur where law enforcement had every intention of seeking the warrant prior to the unlawful entry into the defendant's home. Id. In this case a warrant was sought only after the officers exceeded the scope of consent and found contraband without a warrant.

Search Beyond Scope of Warrant

29. The Fourth Amendment protects against warrantless searches. "The Fourth Amendment was adopted in part to ward off the menace of 'general searches'." United States v. Young, 877 F.2d 1099, 1105 (1stCir. 1989); citing, Maryland v. Garrison, 480 U.S. 79, 84 (1987); Andresen v. Maryland, 427 U.S. 463, 479-80 (1976); Marron v. United States, 275 U.S. 192, 195-96 (1927); United States v. Fuccillo, 808 F.2d 173, 175 (1stCir.); United States v. Abrams, 615 F.2d 541, 543 (1stCir. 1980).

30. The law enforcement officers involved in the search of the [redacted] residence seized items outside those items listed in the Warrant converting the search to a general search. The Warrant does not authorize the seizure of cameras. These items were seized as part of the search. On January 26, 2006, Sgt. Collins without further

authorization took measure to view photographs on the seized digital camera.

31. Seizure of items outside those specifically authorized by the Warrant requires at a minimum the suppression of those things seized outside the Warrant's authority. In some cases suppression of all items and documents seized is required. See, United States v. Young, 877 F.2d 1099, 1105 (1st Cir. 1989); see also, United States v. Abrams, 615 F.2d 541, 543 (1st Cir. 1980).

Search of Camera and Computer Beyond Scope of Warrant.

32. The officers seized a camera which was not amongst the items that were authorized to be seized by the warrant. Additionally the officers seized a laptop computer which was authorized to be seized in the warrant. However, the warrant does not authorize the officers to examine the contents of the computer or to review any files on said computer.

33. The warrantless search of the camera and computer was unlawful and the fruits thereof should be suppressed. The First Circuit Court of Appeals has not specifically addressed this issue, however, the Tenth Circuit has confronted the issue of warrantless computer searches. In United States v. Carey, the United States Court of Appeals for the Tenth Circuit addressed whether or not the police exceeded the scope of a warrant by viewing files on a computer not related to the search authorized by the warrant. United States v. Carey, 172 F.3d 1268 (10th Cir., 1999). The warrant specifically authorized searches of the computers for drug related activity. Id. at 1271. The Tenth Circuit found that the police exceeded the scope of the warrant by not limiting the search of the computer and data in their custody, stating "enforcement

officers can generally employ several methods to avoid searching files of the type not identified in the warrant: observing files, types and titles listed on the directory, doing a keyword search for relevant terms, or reading portions of each file stored in the memory". Id. at 1276. Because the police had not so limited their search in United States v. Carey, the court found that the search exceeded the scope of the warrant and found that the district court erred by refusing to suppress the evidence obtained as a result of the illegal search. Id. This holding supports the argument that an additional warrant, distinct from the Warrant authorizing seizure, is required prior to the search of the computers. This argument applies to a digital camera as well which is nothing more than a specific use miniature computer.

34. This holding comports with prior rulings of the United States Supreme Court. In United States v. Chadwick, 433 U.S. 1 (1977), the United States Supreme Court found the search of a footlocker "conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody . . ."; to be in violation of the Fourth Amendment. Id. at 15. The Court stated "[e]ven though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn." Id. "In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." Id. This same reasoning applies to computers and computer equipment in the possession and control of law enforcement. A separate and distinct warrant should be sought and obtained prior to the indiscriminate searching of an

individuals computers or cameras.

35. In Walter v. United States, 447 U.S. 649 (1980), the United States Supreme Court held that FBI agents violated the Fourth Amendment when they conducted a warrantless search by viewing films discovered by a third party describing obscene material contained in the films. Id. at 658-659. The Court stated, "[t]he projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. The separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained." Id. at 657. Similarly, in this case the officers should have obtained a separate warrant to proceed further in examining the contents and files on the camera and computer.

36. Law enforcement expanded the search authorized by the Warrant (1) by seizing material not articulated in the Warrant; (2) by searching computers and camera equipment seized under the Warrant; and (3) by viewing the contents of the camera and computer once in the possession of law enforcement.

37. Due to the nature of this motion the assent of the Government was not sought.

38. The points and authorities necessary to support the relief requested herein are contained in this motion and further legal memorandum is unnecessary.

WHEREFORE the Defendant, requests this Honorable Court:

A. Suppress all evidence obtained as a result of the original warrantless search

and of the search pursuant to warrant of the [redacted] residence in Sunapee, N.H. ; and,

B. Hold a hearing on this Motion; and

C. Grant such further relief as justice and equity may require.

Respectfully submitted,

[redacted], Defendant

By his Attorneys,

BRENNAN, CARON, LENEHAN & IACOPINO

Date: June 14, 2006

By: /s/ Michael J. Iacopino

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Certificate of Service

I hereby certify that a copy of the foregoing Motion was served on the following person, even date herewith, and in the manner specified herein: electronically served through ECF: Assistant United States Attorney Debra Walsh, United States Attorney's Office, James C. Cleveland Federal Bldg., 55 Pleasant St., Room 352, Concord, NH 03301-3941.

/s/ Michael J. Iacopino, Esq.
Michael J. Iacopino, Esq. (Bar No. 1233)