

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
vs.)
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)
BERNADO BELTRAN,)
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)
 Defendant.)

Cr. No. 02-20100-GV

REPORT AND RECOMMENDATION ON BELTRAN'S MOTION TO SUPPRESS

Defendant Bernado Beltran was arrested on March 10, 2002, and indicted on one count of possession with intent to distribute approximately 2200 grams of cocaine in violation of 21 U.S.C. § 841(a)(1). Beltran seeks to suppress the cocaine and other incriminating evidence found by police officers during the search of his home at 3328 Coleman Avenue, Memphis, Tennessee. As grounds, Beltran asserts that the warrantless search of his home was illegal because the police did not have a valid consent to search. United States District Judge Julia S. Gibbons referred Beltran's motion to the undersigned magistrate judge for an evidentiary hearing and a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

An evidentiary hearing was held on August 13, 2002. At the hearing, the government called three witnesses: Special Agent Gary

Evans, Officer Kevin Martin, and Officer Mike Griffus, all members of the West Tennessee Joint Drug Task Force. The defense called Josie Benitez, Eva Castello de Beltran, and the defendant Bernado Beltran who testified on his own behalf. For the following reasons, Beltran's motion should be denied.

PROPOSED FINDINGS OF FACT

On or about March 10, 2002, members of the West Tennessee Joint Drug Task Force arrested three men who were attempting to sell cocaine to an undercover law enforcement agent from their van parked at the Raleigh Springs Mall. The officers found approximately one kilogram of cocaine in the van, which was occupied by the three men. These three men - Fermin Jacobo Quiroz, Ernesto Rangel, and Vincente Lopez - had been the focus of a lengthy surveillance operation by the task force. Just prior to their arrest, the three men had been seen at a house located at 3328 Coleman Avenue, Memphis, Tennessee. Members of the task force had seen the three men leave that address to meet up with the undercover agent at the Raleigh Springs Mall to sell cocaine. Through extensive surveillance, the task force knew that the men frequented the 3328 Coleman address as well as a residence on National Street, also located in Memphis, Tennessee.

After placing the three men under arrest for possession of a controlled substance with intent to distribute, the officers

decided to perform "knock and talk" investigations at the Coleman and National addresses. The officers ran a MLGW check on the Coleman house and determined that a woman named Eva Castello paid the utility bill. One of the lead officers at the 3328 Coleman "knock and talk" was Gary Evans, an INS agent who is cross-assigned to the DEA in Memphis. Accompanying him were about eight officers from various law enforcement agencies. Agent Evans was the only member of the task force at 3328 Coleman who could speak Spanish fluently.

When they arrived at the Coleman address that evening, the officers took up various positions on the porch and in the yard of the home. Agent Evans went to the front door of the home, and two or three other officers stood on the front steps and porch. None of the officers unholstered his weapon. Agent Evans knocked three times. Officer Griffus, who was positioned on the corner of the house, saw a man run through the kitchen, enter the bedroom, and quickly lie down on a bed. Griffus communicated what he saw to the other officers. After the third knock, a young woman came to the inner door of the house and opened it. Agent Evans, unsure of the girl's age, told her in Spanish that he was with the police and asked to speak with the owner of the house or someone of competent age. The girl, later determined to be Josie Benitez, a roommate of the Beltrans, walked back into the house. Another woman, Beltran's

wife Eva Castello, soon appeared at the door with a key to unlock the front door. Agent Evans told the woman in Spanish that he was with the police, that a serious crime had been committed, and that it might have originated from her house. He asked her whether he and the other officers could enter the home and look for evidence of the crime. He explained to her that she could say no and that they would leave. She said "enter," in Spanish, unlocked the outer door and let the officers into the house. Agent Evans then turned and told the other officers that they had been invited inside.

Neither of the other officers who testified at the hearing spoke Spanish. Both corroborated Agent Evans' testimony, however, that he spoke with Benitez and Costello in Spanish and that Costello, after speaking with Evans, voluntarily opened the door and indicated that the officers could enter the house.

Four or five agents then entered and conducted a security sweep of the house. During the sweep, which lasted about forty-five seconds, the officers unholstered their weapons and looked in each of the adjoining rooms off of the foyer. As part of the sweep, two of the officers entered the bedroom where Beltran was lying in bed with the covers pulled up to his chin. Two small children were also in the room. Officer Kevin Martin stated in Spanish that he was with the police and told Beltran to hold up his hands. Beltran complied. Officer Martin then allowed Beltran to

put on pants, handcuffed him and walked him to the living room, and sat him on a couch. Agent Evans then Mirandized Beltran and asked him his name, his date of birth, and his Social Security number. He replied that he did not have a Social Security number.

The two women were told to sit on another couch in the living room with Beltran. All were told by the police not to speak to each other. The police brought the two children out of the bedroom. While police were searching the home, Castello's brother Lorenzo arrived at the house. The police asked him to sit in a chair while they continued to search. The officers did not handcuff Lorenzo or search him.

In the course of the search of 3328 Coleman, the officers found numerous drugs and drug-related items. On the floor of the kitchen pantry, officers found a scale containing a white powdery substance and what appeared to be a drop of blood. A knife on the stove was covered in a white powder. In the back yard, the officers found tires that had been slashed along the sides next to a truck which appeared to have that same size tire mounted on it. Back in the house, officers found another slashed tire in the attic, along with bricks of cocaine that were loosely covered with insulation, but still visible. The bricks amounted to approximately 2200 grams of cocaine. The officers also found counterfeit currency under Beltran's bed in the amount of

\$3,900.00.

During the search of her home, Castello was taken out of the living room a few times so that the police could show her the location of the various items discovered in her home. Agent Evans also asked Castello to step outside, and he asked her about the man on her porch earlier that day and the white van used by the three men arrested earlier. According to Castello, she was at the zoo most of the day and did not see anything. At some point during the search, Agent Evans presented a "consent to search" form to Costello. The form was in English, and Agent Evans translated the form in Spanish for her. He explained that the purpose of the form was to indicate her willing consent to the search. Castello then signed the form. The officers took pictures of the evidence and the search concluded after about two hours. The officers left the residence with the evidence and with Beltran in custody.

There are discrepancies among the testimony of the witnesses.

First, Beltran testified that the officers led him out of the bedroom with only his underwear on; his wife and Benitez both testified, however, that he had on long pants when he was led into the living room. Second, Benitez testified that the police officers did nothing more than identify themselves when she came to the door. Benitez also testified that she could not speak any English. Her response to the question, however, came before the

question was translated to her in Spanish. Clearly, she was able to at least understand the basic premise of the question when it was stated to her in English. The court finds that Benitez's testimony was not completely credible.

Third, Castello stated that she gave police consent to search her home for the sole purpose of looking for other people inside the house. She claims that Agent Evans never asked her if the officers could look for evidence of a crime and that he did not explain the reason that they wished to search her home. She claimed she was frightened by the police, although she stated that she did not run to get the key when she saw the officers at her door; rather, she walked to find the key. She also stated that all of the officers were very polite to her and the others in the home. At the hearing, the government showed Castello photos of the scales, the slashed tires in her backyard, and the white van seen in front of her home earlier that day. She claimed she had never seen any of these items, though she identified her stove in the background of the picture of the scales. She also claimed that the tires in the backyard must belong to the previous tenant of the house. The court finds Castello also to be a less-than-credible witness.

The court finds as fact that the events transpired much the way the three officers testified, that the officers stated their

purpose when they spoke with Benitez and Castello, and that the officers obtained consent from Castello to search the house for evidence of a crime.

PROPOSED CONCLUSIONS OF LAW

As an initial matter, the government asserts that Beltran does not have standing to contest the officers' entry into the house because the house was actually his wife's. Before this court may proceed with its analysis of the Fourth Amendment issues presented in this case, the standing issue must be resolved.

A. Standing

Beltran asserts he has standing to contest the officers' entry at 3328 Coleman, even though he did not pay utility bills and his name was not on the lease. Beltran has the burden of showing that he has standing. *United States v. Sangiento-Miranda*, 859 F.2d 1501, 1510 (6th Cir. 1988).

Over twenty years ago, the Supreme Court expressly rejected the "rubric of standing" as to violations of the Fourth Amendment. *Minnesota v. Carter*, 119 S. Ct. 469, 472 (1998) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). Instead, the proper inquiry is whether the defendant personally has an expectation of privacy in the place searched. *Rakas*, 439 U.S. at 143-44.

Beltran testified that he and his wife had lived together in the house at 3328 Coleman since December 1, 2001. At the time of

the search, they had been residing together in the home for approximately three and a half months. His testimony is uncontroverted in this regard. Overnight guests and temporary residents have a reasonable expectation of privacy in a place where they sleep. *Minnesota v. Olson*, 495 U.S. 91 (1990). Therefore, Beltran's continuous presence in the home with his wife and children for three and a half months gives him a reasonable expectation of privacy in the home at 3328 Coleman. It is submitted therefore that Beltran has standing to challenge the search.

B. Consent

Beltran seeks to suppress the evidence discovered by police as a result of the warrantless search of 3328 Coleman. He contends that the police did not obtain valid consent from Castello to search the house for evidence of a crime and that Castello was intimidated and coerced by the number of officers at her door and then later in her home. In opposition to Beltran's motion, the government argues that Castello fully understood what the police were asking her to do and that she allowed them into the home without protest. Further, the government counters that Castello was not intimidated or coerced, as evidenced by her own testimony.

The Fourth Amendment does not proscribe all searches and seizures by a government authority. Instead, it prohibits only

those that are "unreasonable." U.S. CONST. amend. IV. The preferred procedure is for the government to obtain a warrant from a neutral and detached judicial officer prior to conducting a search of a private residence. To that end, the United States Supreme Court has declared that "only in 'a few specifically established and well-delineated' situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it." *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The burden lies squarely upon the government to prove the existence of a recognized exception to the warrant requirement. *Id.*

A consensual search is an exception to the Fourth Amendment's implied proscription against warrantless searches. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). If the validity of a search rests on consent, the government has the "burden of proving that the necessary consent . . . was freely and voluntarily given." *Florida v. Royer*, 460 U.S. 491, 497 (1983). Mere acquiescence to a police officer's claim of lawful authority does not constitute free and voluntary consent. *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

The Supreme Court has articulated a list of factors which must be evaluated in determining whether consent was provided freely and

voluntarily. In *Schneckloth*, the Court found that no single factor was determinative of voluntariness; rather, voluntariness is to be determined by the totality of the surrounding circumstances. *Schneckloth*, 412 U.S. at 226. Relevant factors include the defendant's age, education, intelligence, evidence of duress or coercive activity, and the presence or absence of warnings concerning the defendant's rights under the Constitution. *Id.* Although the holding in *Schneckloth* was limited to noncustodial searches, those same principles were later extended to apply to custodial searches as well. *United States v. Watson*, 423 U.S. 411, 424-25 (1976) (considering as relevant factors use of force or threats of force, subtle forms of coercion, whether the search took place in public or at the station, the defendant's experience with the law, intellect, and the presence or absence of constitutional warnings).

The Sixth Circuit described its analysis for determining the validity of a consent to search in *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996) as follows:

A court will determine whether consent is free and voluntary by examining the totality of the circumstances. It is the Government's burden, by a preponderance of the evidence, to show through "clear and positive" testimony that valid consent was obtained. Several factors should be examined to determine whether consent is valid, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature

of detention; and the use of coercive or punishing conduct by the police.

Riascos-Suarez, 73 F.3d at 625 (citations omitted). Knowledge of the right to refuse consent is "one factor" to consider, but the "government need not establish such knowledge as the *sine qua non* of effective, voluntary consent." *Schneckloth*, 412 U.S. at 227. The Sixth Circuit recently reiterated that the voluntariness of a defendant's consent to search is based on the "totality of the circumstances." *United States v. Burns*, No. 00-5839, 2002 Fed. App. 0255P (6th Cir. July 29, 2002) (citing *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996)).

Applying the relevant factors to this case, the court submits that Castello freely and voluntarily consented to the search of the house. In that her name was on the lease and she was paying the utility bill at the house, plainly she had authority to grant permission to the officers to enter her home and search. "Valid consent [to search] may be given by someone with an actual privacy interest in the place to be searched, *Riascos-Suarez*, 73 F.3d at 625, or with apparent authority over that place, *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990)." *United States v. Elkins*, No. 00-5662, 2002 Fed. App. 0262P (6th Cir. Aug. 2, 2002) (slip opinion).

Although Castello could not speak English, Agent Evans, who is

fluent in Spanish, explained why the officers were present and for what they were searching. Costello's full awareness of the officers' purpose is evidenced by her continued acquiescence to the officers' presence in her home. The officers searched for approximately two hours, and Costello neither complained nor urged the officers to leave. After the search had begun, Agent Evans explained the consent to search form to Castello in Spanish and further explained that its purpose was to demonstrate her cooperation and agreement to allow the officers to search her home. Castello signed the form and allowed the officers to search her house for two hours.

In addition, Castello testified that she had attended school in Mexico until the American equivalent of the twelfth grade, but she did not graduate. She is currently twenty-seven years old and has been working for a manufacturer in Olive Branch for almost three years. Based on her level of education and her age, she should have been able to understand the nature of the officers' request to search her home.

Castello's voluntariness is further evidenced by her obvious lack of fear of the officers. She claimed that the officers made her nervous. When Benitez summoned her, however, she walked calmly to find the key to unlock the front exterior door. She discovered that the key was not in its usual place, but still she did not

state that she was rushed. She also stated that all of the officers spoke to her politely and did not mistreat either her or anyone else in or around the home.

There was no proof whatsoever that the officers threatened Costello or pointed their guns at her. Although the officers drew their guns when they entered the home, at that time they had already received permission from Castello to come inside and search. Police officers may draw their guns if this precaution is "reasonably necessary for the protection of the officers." *Houston v. Clark County Sheriff Deputy John Does 1-5*, 174 F.3d 809, 814-15 (6th Cir. 1999). The officers had no idea who or what they might encounter in a house suspected to house drug dealers and their contraband. When the officers came across Beltran in the bed, he had the covers pulled all the way up to his chin. The officers had no way to know if Beltran might be concealing a weapon under the blanket. After securing Beltran and checking the other rooms of the house, all officers replaced their weapons in their holsters.

The court submits that upon examination of all relevant factors Castello had authority to consent to the search and gave her consent knowingly and voluntarily.

C. Scope of Consent

Castello testified that she told the officers that they were allowed to search only for other people within the house. Even if

this court were to believe Castello on this point, which it does not, the officers did not exceed the scope of the consent that she gave them. A search allowed by consent normally is only as broad as the scope established by the person granting consent. *United States v. Elkins*, 2002 Fed. App. 0262P (6th Cir. Aug. 2, 2002) (slip opinion). Here, every item discovered during the search of the house was in plain view in areas where a person could have been hiding.

For the plain view exception to the exclusionary rule to apply in the Sixth Circuit, the government must show two things. First, it must show that the police officers were "lawfully . . . in an area from which the object is plainly visible." *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir. 1996) (citing *United States v. Blakeney*, 942 F.2d 1001, 1028 (6th Cir. 1991)); see also *United States v. Morgan*, 743 F.2d 1158, 1167 (6th Cir. 1984). Second, the incriminating character of the evidence must be "immediately apparent." *Horton v. California*, 496 U.S. 128, 136-37 (1990); see also *Morgan*, 743 F.2d at 1167.

This court already has determined that the police were lawfully present in the house because Castello had given them permission to enter. The incriminating nature of cocaine bricks, coupled with scales covered in white residue, a knife with white residue on it, counterfeit money, and slashed tires, a common

hiding place for drugs in transport, was immediately apparent. Further, police found each of the items in areas where people could have been hiding. The officers testified that the scales were found on the floor of the pantry; the slashed tires were in the attic and the backyard; the knife was on the kitchen counter; and the money was under the bed. The cocaine was plainly visible, showing through the insulation in the attic; it was not, for example, in a small drawer or hidden within the stuffing of a mattress. All these items were located in places people could have occupied as hiding places from police. Thus, the search of the house, even if constrained by Castello's purported limited scope of consent, which this court submits is not an accurate portrayal of the facts, is a valid search under the Fourth Amendment and does not violate Beltran's constitutional rights.

RECOMMENDATION

It is therefore recommended for the reasons set forth above that Beltran's motion to suppress the evidence discovered and seized during the search of the house on 3328 Coleman be denied.

Respectfully submitted,

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

Date: _____