UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 07-80138-CR-MARRA/VITUNAC(S)

UNITED STATES OF AMERICA,

Plaintiff,

-versus -

FRANK SARCONA,
Defendant.
_____/

GOVERNMENT'S REPLY TO DEFENDANT'S SUPPLEMENT AUTHORITY TO HIS MOTION TO SUPPRESS THE EVIDENCE OBTAINED FROM THE SEARCH WARRANT EXECUTED AT 6720 EAST ROGERS CIRCLE[1]

Introduction

The United States herein replies to defendant Frank Sarcona's (hereinafter "Defendant) February 2, 2009, Supplemental Authority To His Motion to Suppress And Otherwise Exclude Evidence, Challenging Constitutionally Impermissible Search, Executed Pursuant to Search Warrant, Obtained in Violation of Franks v. Delaware (the "Supplemental").

Argument

A. Defendant Is Unable to Demonstrate A Reasonable Expectation of Privacy

Defendant still *has not*, even after his third pleading on this matter, *and will not* if there is a subsequent hearing on this issue, be able to establish that he has a reasonable expectation of privacy in the premises that was searched at 6720 East Rogers Circle. While Defendant has now

[1] At the January 22, 2009, Scheduling Conference, Defendant withdrew his challenge to the search warrant executed at the SW 66th Ave. location. Instead, Defendant's counsel stated that Defendant was only challenging the search warrant executed at the East Rogers Circle location, which, according to the affidavit, was a commercial premises in which Lipoban's operations were conducted. See Attachment A to the October 18, 2004 Affidavit.

updated his motion to contain the allegations that he had a key to the premises, knew the alarm code, received facsimile and mail correspondence there, and had a personal document at the location, his latest pleading once again is devoid of an affidavit or any other supporting evidence to establish these facts. Moreover, his counsel stated at the January 22, 2009, status conference that he would not, indeed could not, have his client testify on this motion based on his previous grand jury testimony. Instead, counsel stated that Defendant intended to call the Special Agent who was the affiant on the search warrant affidavit in an apparent attempt to establish his own legitimate expectation of privacy.

Relying on the testimony of a government witness, however, is insufficient to establish a defendant's subjective expectation of privacy. See United States v. Best, 255 F.Supp.2d 905, 911 (N.D. Ind. 2003). "An affidavit or testimony *from a defendant* is nearly essential for establishing that defendant's subject expectation of privacy for Fourth Amendment purposes." United States v. Best, 255 F.Supp.2d 905, 911 (N.D. Ind. 2003)(emphasis added) (citing Ruth, supra, 65 F.3d at 604-605; United States v. Meyer, 157 F.3d 1067, 1080 (7th Cir. 1998) (citing Ruth, 65 F.3d at 604-605)); see also United States v. Singleterry, 821 F.Supp. 36, 38 (D. Me. 1993) ("Defendant must make a factually supported showing that he had such a subjective and reasonable expectation in the specific circumstances of this case"). As the court in Best observed:

> Defendant correctly concluded that he could not establish his subjective expectation of privacy in 798 Porter Street by simply relying on the testimony of others. This is especially true when such testimony comes from Government witnesses such as Gardner and Williams.

255 F.Supp.2d at 911; see also Ruth, 65 F.3d at 605 ("we agree with the district court that

'without an affidavit or testimony from the defendant it is almost impossible to find a privacy interest because the interest depends, in part, on the defendant's subjective intent and his actions that manifest that intent").

Accordingly, Defendant has not and will not be able to establish the facts he has asserted in his Supplemental. Therefore, Defendant's heretofore and proposed course of action is insufficient to satisfy his initial burden on this issue, which is to establish his subjective expectation of privacy in the East Rogers Circle premises.

B. Defendant's New Allegations Do Not Establish a Reasonable Expectation of Privacy

Even assuming Defendant could factually establish his new allegations, they do not demonstrate that he had a reasonable expectation of privacy in any of the areas search at the East Rogers Circle premises. According to the Eleventh Circuit, the Fourth Amendment only protects:

> an individual in those places where [he] can demonstrate a reasonable expectation of privacy against government intrusion, and only individuals who actually enjoy the reasonable expectation of privacy have standing to challenge the validity of a government search. The party alleging an unconstitutional search must establish both a subjective and an objective expectation of privacy. The subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that the privacy expectation be one that society is prepared to recognize as reasonable.

United States v. King, 509 F.3d 1338, 1341 (11th Cir. 2007) (internal citations omitted).

Individuals generally have a lesser expectation of privacy in a commercial premises as compared to a residential premises. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."

Minnesota v. Carter, 525 U.S. 83, 90 (1988) (quoting New York v. Burger, 482 U.S. 691, 700 (1987)). Thus, a person "simply permitted on the premises," *i.e.* an individual who is only on a premises for a purely commercial transaction, for a relatively short period of time, and who lacks any previous connection with the householder, does not have a legitimate expectation of privacy. Carter, 525 U.S. at 91.

An *employee* may in certain circumstances have a reasonable expectation of privacy over his own workplace, such as the desks and file cabinets in his own private office, see O'Connor v. Ortega, 480 U.S. at 724, or even an office he shared with other employees. See Mancusi v. DeForte, 392 U.S. 364 (1968). As the Tenth Circuit has observed:

> "Most cases that discuss employee standing involve seizure of work-related documents from the workplace. In such cases, the relationship or 'nexus' of the employee to the area searched is an important consideration in determining whether the employee has standing. See United States v. Mahoney, 949 F.2d 1397, 1403-04 (6th Cir. 1991) (en banc) (defendant did not have standing to challenge seizure of documents which he did not prepare when they were store in offices he rarely visited.); United States v. Taketa, 923 F.2d 665, 670-71 (9th Cir. 1991) (defendant did not have standing to challenge search of coworkers desk in adjoining office even though he had access to it, but he did have standing to challenge search of his own desk); United States v. Chuang, 897 F.2d 646, 649-51 (2d Cir. 1990) (defendant could not challenge seizure of documents found in another employee's office); United States v. Torch, 609 F.2d 1088, 1091 (4th Cir. 1979) (defendant did not have standing to challenge search of building when he was not present at time of search, he did not work for building owner although he occasionally used the building, he did not have assigned work area, and the desk he occasionally used was not locked and all employees had access to it); United States v. Britt, 508 F.2d 1052, 1056 (5th Cir. 1975) (corporate president did not have standing to challenge seizure of documents from off-site warehouse because he failed to demonstrate a 'nexus between the area searched and [his] work space.'"

See United States v. Anderson, 154 F.3d 1225, 1230 (10th Cir. 1998), *cert. den.*, 199 U.S.

LEXIS 3848 (June 7, 1999)).

The Eleventh Circuit has drawn a distinction between an individual who is a "mere guest or invitee" and one who has maintained both "custody and control" of a premises. See Chaves, 169 F.3d 687, 691 (11th Cir. 1999). It has found that simply possessing a key to an apartment is insufficient to satisfy the defendant's burden of establishing a legitimate expectation of privacy. See United States v. Baron-Mantilla, 743 F.2d 868, 870 (11th Cir. 1984) (no legitimate privacy claim where individual did not own or rent the premises searched, did not have the telephone listed in his name, and failed to establish "an unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee") (citations omitted); Chaves, 169 F.3d at 690 (simply claiming ownership of the contraband found in a searched premises is insufficient to sustain the defendant's burden, because it is incumbent upon the defendant to "show that he had a reasonable expectation of privacy in the place searched and he failed to do so"); but see Chaves, 169 F.3d at 691 (individual had legitimate privacy claim where he, despite owning or formally renting the warehouse, owned *the only key* to the warehouse and kept personal and business papers at the warehouse).

However, as discussed in the Government's response to Defendant's initial motion on this issue, Defendant has denied in previous testimony that he was a Lipoban employee. Furthermore, he does not identify in any of his three pleadings a particular area or areas at the East Rogers Circle premises where he maintained an expectation of privacy, such as a personal work space, desk, or even his own file cabinet. Instead, he essentially claims that he had an expectation of privacy over *the entire premises* based on the fact that he had a key, knew the

alarm code, received correspondence there, dropped of and picked-up documents there, and had one purported personal document at the premises.[2] These allegations, even if established, are simply insufficient for Defendant to demonstrate "custody and control," and thus a reasonable expectation of privacy anywhere on the East Rogers Circle premises, especially from one who apparently (based on his pleadings) was not present during the search.

Indeed, this Court has recently found based on extremely analogous facts that an individual did not have a reasonable expectation of privacy in a searched premises. In United States v. Hernandez, 2007 U.S. Dist. LEXIS 74375 (S.D. Fla. 2007), this court found, *after the defendant testified*, the following facts:

> Defendant Cruz did testify on this issue. He stated that he was the manager in charge of the pharmacy at that time of the search, possessing a key to the front door and other doors within the pharmacy. Mr. Cruz' diplomas were at the front of the premises, and his computer was in the regular pharmacy area. Additionally, Mr. Cruz had the code to the burglar alarm and was free to go anywhere within the pharmacy.
>
> Mr. Cruz' car was registered listing the address for the pharmacy, but this was done as the result of the fact that he was experiencing marital problems and believed that he might have to move from his residence. He received professional mail at the pharmacy, as well as mail pertaining to his car insurance.
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> On cross examination, Mr. Cruz testified that he was never an

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[2] Noticeably absent from the Supplemental is the material fact that Kathy Brock, one of the signatories to Defendant's alleged "personal document" did marketing work for Lipoban and who, according to Defendant, worked out of the Lipoban office for a period of time. See July 6, 2006, Grand Jury testimony of Frank Sarcona at 67-70, which is attached hereto as Exhibit 1. In light of this omitted fact, it is highly questionable that Defendant can claim this document as a "personal document," considering that Ms. Brock and her husband had as much possessory right to this purported document as did the Defendant, and that it was entirely possible that the document that was seized at the East Rogers Circle premises was Ms. Brock's copy of the contract.

> officer or resident agent for the pharmacy. He was an employee who was paid by regular payroll check, and received a W-2 federal tax form from the company. Mr. Cruz did not keep personal documents (other than those pertaining to his car) at the business premises, but did keep a toiletries and a change of clothes. He did not receive personal mail there and there was no area within the pharmacy that used only by him. Others used the same computer, and Mr. Cruz did not know the computer password.

Hernandez, 2007 U.S. Dist. LEXIS at *49-50. Based on these facts, this Court concluded that Defendant had not established a reasonable expectation of privacy. Id. at *50 (citing United States v. Chaves, 169 F.3d 687, 690-91 (11th Cir. 1999), *cert. denied* 528 U.S. 1048 (1999)).

In the case at bar, Defendant, too, has not alleged facts in his pleadings that if established would demonstrate a reasonable expectation of privacy in the East Rogers Circle location. He, therefore, has not shown that he will be able to sustain his initial burden on this issue even if he were to testify at a subsequent hearing.

C. Defendant Is Not Entitled To A Hearing On This Issue Based On His Pleadings

"[O]rdinarily 'it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he . . . establish, that he himself was the victim of an invasion of privacy.'" United States v. Bachner, 706 F.2d 1121, 1127 (11th Cir. 1983) (quoting United States v. Salvucci, 448 U.S. 83, 86 (1980) (quoting Jones v. United States, 362 U.S. 257, 261 (1960)). Thus, "the proponent of the motion to suppress, ha[s] the burden of establishing that his own Fourth Amendment rights were violated by the challenged search and seizure." Bachner, 706 F.2d at 1127.

"Where a defendant in a motion to suppress fails to allege facts that if proved would require the grant of relief, the law does not require that the district court hold a hearing

independent of the trial to receive evidence on any issue necessary to the determination of the motion." United States v. Sneed, 732 F.2d 886, 888 (11th Cir. 1984). "Defendants are not entitled to an evidentiary hearing based on a 'promise' to prove at the hearing that which they did not specifically allege in their motion to suppress." United States v. Cooper, 203 F.3d 1279, 1284-85 (11th Cir. 2000) (upholding district court's refusal to hold an evidentiary hearing where Defendants' motion to suppress, which merely concluded that the hotel room was "theirs,"was "wholly lacking in sufficient factual allegations to establish standing").

Defendant has now had three opportunities to demonstrate for this Court how he will establish that he had a reasonable expectation of privacy in any area in the East Rogers Circle premises. As discussed above, Defendant's allegations, even if they could be supported at a subsequent evidentiary hearing, would not be sufficient to sustain his initial burden on this issue. As a result, his motion should be denied without a hearing.

Conclusion

For the foregoing reasons, the United States respectfully submits that defendant's Amended Motion should be denied, and no evidentiary hearing should be held.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 9, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Kerry S. Baron
KERRY S. BARON
ASSISTANT UNITED STATES ATTORNEY