

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 4:03 CR 79 CDP
)
ARTHUR LASHLEY,)
)
 Defendant.) DDN

**ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the Court upon the pretrial motions of the parties, which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on April 2 and 4, 2003.

I. MOTION TO DISCLOSE CONFIDENTIAL INFORMANT

Defendant Arthur Lashley has moved to disclose confidential informant, asserting that a raid of defendant's property was based on information from a confidential informant and expressing concern that the informant may be used as a witness. (Doc. 15.) The government opposes disclosure on the grounds that the informant (1) will not be a witness for the government, (2) merely conveyed information to law enforcement officers who initiated an investigation by responding to defendant's residence, and (3) was neither present during nor participated in any of the conduct charged in the indictment. (Doc. 18 at 6-7.)

Under Roviaro v. United States, 353 U.S. 53 (1957), a defendant is not necessarily entitled to discover an informant's identity; the court must balance the defendant's need to know the informant's identity with the public's interest in keeping it confidential. Id. at 62. The defendant's need for disclosure

might be established by showing that the informant was a material witness to the events to be proved at trial or that the informant's testimony is crucial to his defense. Id. at 64-65; United States v. Feldewerth, 982 F.2d 322, 324 (8th Cir. 1993).

Given that the government will not be calling the informant as a witness and defendant has not shown the materiality of the need for disclosure, defendant's motion will be denied. See United States v. Lindsey, 284 F.3d 874, 878 (8th Cir. 2002) (generally, there is a strong presumption against disclosure if the confidential informant is a mere "tipster"); United States v. Alcantar, 271 F.3d 731, 739 (8th Cir. 2001) (to overcome the government's nondisclosure privilege, defendants must establish beyond mere speculation that the informant's testimony will be material to the determination of the case), cert. denied, 535 U.S. 964 (2002). Although defendant questions whether there really was an informant, the existence of the informant is not determinative of the admissibility of the evidence seized from defendant's property, because the government is asserting that defendant voluntarily consented to the search of the property.

II. MOTION TO INSPECT AND CONDUCT TESTING

Defendant has moved to inspect and conduct testing of three containers and their contents. (Doc. 13.) The government does not oppose defendant's motion. (Doc. 18 at 5-6.) At the hearing on April 2, 2003, the parties agreed that, among themselves, they would work out a procedure for the purpose of allowing access to the items mentioned in defendant's motion, including additional testing. Therefore, defendant's motion is denied as moot.

III. MOTION TO DISMISS

Defendant has moved to dismiss the indictment, asserting that the "same cause of action is pending in the Circuit Court of Jefferson County, State of Missouri." (Doc. 14.)

The Fifth Amendment assures that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "It is the defendant's burden to show a nonfrivolous claim of double jeopardy." United States v. Aquilera, 179 F.3d 604, 607 (8th Cir. 1999).

Defendant's double jeopardy claim is moot. At the hearing on April 2, defendant informed the court that the state charge had been, or would soon be, dismissed. Even if the state charge has not been dismissed, the limited facts alleged by defendant do not show that jeopardy ever attached in the state case. See United States v. Curry, No. 02-3300, 2003 WL 21003712, at *1 (8th Cir. May 6, 2003) (jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence). Moreover, even if Missouri were to try defendant for an offense relating to the items and substance seized from his property on October 17, 2002, defendant has not stated sufficient grounds to dismiss the federal indictment. See United States v. Kehoe, 310 F.3d 579, 587 (8th Cir. 2002) ("To show a violation of the Double Jeopardy Clause, a defendant must prove that the offenses for which he is prosecuted and punished are the same offense in both law and fact."), petition for cert. filed, No. 02-10091 (Apr. 10, 2003); United States v. Alverez, 235 F.3d 1086, 1089-90 (8th Cir. 2000) (same), cert. denied, 532 U.S. 1031 (2001). Moreover, "[t]he dual sovereignty doctrine provides that although a defendant may not be prosecuted twice by the same sovereign for the same acts, a subsequent prosecution by a separate sovereign does not violate the Constitution." United States v. Johnson, 169 F.3d 1092, 1095-96 (8th Cir.), cert. denied, 528 U.S. 857 (1999); see also United States v. Lara, 324 F.3d 635, 637 (8th Cir. 2003) (en banc) (the

dual sovereignty doctrine's application turns on whether the two entities draw their authority from distinct sources of power).

IV. MOTIONS FOR PRETRIAL DETERMINATION AND TO SUPPRESS EVIDENCE

The United States has moved for a pretrial determination of the admissibility of evidence (Doc. 0), while defendant has moved to suppress evidence (Doc. 12).

From the evidence adduced at the hearing, the undersigned makes the following findings of fact and conclusions of law.

A. FACTS

1. On October 17, 2002, around 9:00 a.m., John Grable arrived at defendant Arthur Lashley's residence, located at 7985 Jim Weber Road in Jefferson County, Missouri.¹ Grable was there to perform mechanical work on a bucket truck in exchange for money. Defendant met him on the front porch.

2. A short time later, around 9:30 a.m., two Jefferson County housing code inspectors, Donald Alesworth from the Solid Waste Department, and Larry Kennedy from the Planning and Zoning Department, arrived at defendant's property in response to complaints regarding trash and junk on the property. They spoke to both defendant and Grable.² Grable then walked the inspectors around the property as they took pictures documenting code violations. They ordered defendant to remove items from his property, such as junk automobiles, trash, and old wood. They were

¹Defendant testified that Vernon Pruitt owns the property.

²Defendant and his daughter, Patience Lashley, each testified that at some point that morning defendant drove his daughter to school. She testified that she arrived at school in time for the second period, around 9:30 a.m. Both of them testified that she was unable to shower that morning because the tub had been caulked the previous night.

at the property for about 30 to 40 minutes but did not enter defendant's house at any time.

3. Around 1:00 p.m. that day seven officers of the Jefferson County Sheriff's Department, Narcotics Division, arrived at 7985 Jim Weber Road in three unmarked vehicles.³ All seven officers, including Det. Gerald Williams, were wearing raid uniforms readily identifying themselves as police officers.

4. The Sheriff's Department had received information from an incarcerated confidential source in a methamphetamine investigation about one week earlier that there was a tank of anhydrous ammonia, a component necessary for the production of methamphetamine, on defendant's property. The seven officers went to defendant's residence without a search warrant with the intent to interview defendant and conduct a consensual search of the property. Det. Williams knew defendant resided there, from prior investigations. The property, located at the intersection of two roadways, was a single-family brown ranch home with a barn and sheds in the rear.

5. As the officers parked in defendant's driveway, they observed the front door of his house standing open. They looked through the open door and observed defendant sitting at a table wearing a blue shirt. They then saw him get up and leave the room.⁴ They also observed Grable working on the bucket truck

³Defendant testified that the police officers arrived between 10:30 and 11:00 a.m. The undersigned credits the testimony of Det. Williams over defendant's about the officers' arrival time.

⁴Grable testified for defendant that he had been working on the truck and that defendant had gone to a shed in the rear of the property to get a part when the officers pulled up onto the property. Defendant testified that he was in or near the farthest shed on the property looking for the part, that Grable shouted for him to look as the officers approached the property, and that he then dropped the part and walked to the front of the property. The undersigned credits the testimony of Det. Williams about what transpired.

parked in the driveway. Det. Williams approached and briefly asked Grable where Lashley was; Grable said he was in the house.⁵ Grable was then advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and signed a standard form, acknowledging that he understood his rights. He also provided the officers with a written statement indicating that he had seen methamphetamine at defendant's house approximately two weeks earlier.

6. The officers acknowledged that, while in the driveway about 50 feet from the house, they could smell a strong chemical odor they believed to be ether, a noxious and highly explosive chemical involved in methamphetamine production.⁶ Based upon his training and experience, Det. Williams became concerned about the safety of all persons in the residence. As the officers approached the front door of the house, Det. Williams identified himself as the "Sheriff's Department" and shouted for Art Lashley or anyone else to step to the front of the residence. No one responded to this request.⁷

⁵Grable testified that he responded that he knew defendant was on the property but did not know whether defendant was in the house or in a shed. Grable also testified that the officers shouted for him to "get down" and that they handcuffed and arrested him while he was on the ground. Grable then testified that the officers asked him if he knew a Tina Hefferkamp, to which he responded, "No." The undersigned credits the testimony of Det. Williams that this conversation did not occur as Grable testified.

⁶ Grable testified that the only odor he smelled on the property was from the cleaning fluid they were using on the truck.

⁷Defendant testified that after Grable yelled to him that the police were coming, he dropped the truck part and walked back to the front of the house. Defendant then testified that a detective asked him if Tina Hefferkamp was there. Defendant testified that the officers then went into the house and one officer said, "I smell ether. You're under arrest." Defendant further testified that he was asked by the officers where the tank of anhydrous was, he responded that he did not have any anhydrous, and an officer
(continued...)

7. The officers looked inside the house but saw no movement. Three officers then entered the residence,⁸ clearing it room by room, i.e., looking for occupants who might be in danger due to the noxious and dangerous fumes and looking for occupants for purposes of officer safety. No one was found in the house. As the officers cleared the dining room, Det. Williams heard water running. As they continued clearing the house, the officers found water running in the bathtub in the bathroom. In the bathtub, they found a Rubbermaid container with water running into it and overflowing into the bathtub. The odor was strongest in the bathroom. Det. Williams shut off the water and continued through the hall to the rear of the house, where the rear door was standing wide open.

8. When defendant exited through that door, he ran into Det. Brugard at the rear corner of the outside of the house.⁹ The officers finished clearing the house approximately one minute after they began. Doors and windows were left open to ventilate the odor and fumes from the house. Three officers then went to the front of the house; the other officers secured the premises.

9. Det. Williams met defendant when defendant was returned to the front of the house. Det. Williams informed defendant that they were there to perform a consensual search of the premises and to make contact with him regarding a "tip" Det. Williams had received about the manufacture of methamphetamine and defendant being in possession of anhydrous tanks. He then gave defendant two options: (1) defendant could consent to the search, or (2) based on the smell and what Det. Williams had seen, the officers could

⁷(...continued)
responded that he might as well tell the police where the tank was located because they had cameras that would show them the location.

⁸The other officers were positioned outside the residence.

⁹Defendant testified that he was never inside the house during this time.

obtain a search warrant. Defendant seemed relaxed and coherent; around 1:10 p.m. he gave oral and written consent to the search (Gov. Ex. 1.) He had no questions for the officers and signed the standard consent form used by the Sheriff's Department, Government Exhibit 1. No threats were made; he did not seem to be under duress; and he never revoked his consent.¹⁰

10. After his consent to search was obtained, defendant was advised of his Miranda rights. He initialed each of the rights on the form after Det. Williams read it to him. Defendant said that he understood his rights, but he refused to sign his name after the waiver-of-rights paragraph or to make a written statement. He never indicated that he did not understand his rights. He told Det. Williams that he has a lot of property and he cannot control what happens on it.¹¹

11. The officers allowed the house to ventilate for approximately 30 minutes before they safely re-entered to perform the consensual search. They seized numerous items from the house, including one clear plastic bottle marked "D&E Ephedra Nature's White Cross" and containing 250 round gray tablets; one clear glass bottle containing clear liquid; one clear plastic jug containing pink and white powder; one round white tablet; and a Rubbermaid container. The Rubbermaid container, which was found in the bathtub, contained a liquid that was too diluted to be tested.

¹⁰Defendant testified that the officers never asked for consent to search on October 17, 2002. He did not remember signing the permission-to-search form (Gov. Ex. 1), although he did identify his signature on the form. He also testified that the only form he remembered signing was one that a blond officer told him was for documenting the items seized from the property. The undersigned credits Det. Williams's testimony about what transpired.

¹¹Defendant testified that he had no recollection of previously seeing the advice-of-rights form (Gov. Ex. 2), although he did identify his initials on it. Defendant's signature does not appear on the form, as he refused to sign.

12. From the woods on the property behind the house the officers seized two items, each of which were hidden under a piece of carpet: an anhydrous ammonia tank; and a Rubbermaid container holding a pink substance, cloth, and paper towels. This Rubbermaid container was ultimately sent for further testing to determine its contents.

13. During the search of the premises, Det. Finke noticed a pipe leading from the bathroom inside the house to a creek on the property, through which a substance that smelled like ether was draining into the creek.¹² During the search, defendant was first on the front porch, then seated at the dining room table.¹³ At this time, he was not restrained. During this time, the mother of the defendant's daughter drove by the house and defendant received a telephone call from his daughter and he spoke with her.

14. Upon completion of the search, Det. Williams notified officials from the Jefferson County Fire Marshall, Building Inspection, and Solid Waste Departments. They came to defendant's property and conducted inspections; defendant's residence was condemned. The officers also notified the Animal Control Department, which took custody of several animals found on the property.

¹²Around 2:30 p.m., Joseph Rodriguez, an inspector with the Jefferson County Building Department, conducted a search of the property to check for code violations. He did not see this pipe.

¹³Grable asserts that while defendant was inside the house with some of the officers, one officer took him to the side of the house. Grable claims that officer shot pepper spray at the ground and said that, if Grable did not tell him what he wanted to know, he would spray Grable. Grable contends that he was detained for 5 to 6 hours and transported to the Hillsboro Police Department in Jefferson County for photographing and fingerprinting. Grable claims that the same officer informed him that, if he failed to cooperate, he would be charged with the same crime as defendant and would lose his family as a result. No evidence was offered that indicated the officers seized any physical evidence as a result of any asserted cooperation by Grable.

15. Building Inspector Joseph Rodriguez arrived at defendant's residence around 2:30 p.m. to conduct his investigation. Rodriguez took approximately fifteen photographs of the defendant's property to document code violations. While conducting the inspection, he smelled an irritating and noxious odor both inside and outside defendant's house. Rodriguez documented a pipe that he found leading out of the house, which he believed was emitting illegal gray water, i.e., waste wash water.

16. Inspector Alesworth also inspected defendant's property. He did not enter defendant's house during his inspection and he did not notice any noxious smell emanating from it.

B. DISCUSSION

Defendant has moved to suppress evidence that was unlawfully seized without a warrant. The products of the search of defendant's property should not be suppressed. "The Fourth Amendment's general prohibition against warrantless searches does not apply when officers obtain voluntary consent from the person whose property is searched" United States v. Esparza, 162 F.3d 978, 980 (8th Cir. 1998). Det. Williams's testimony and the government's documentary evidence (Gov. Ex. 1) establishes that defendant consented to the search. See United States v. Pereira-Munoz, 59 F.3d 788, 792 (8th Cir. 1995) (because defendant consented to the search, the products of the search are admissible). Having considered the factors identified in United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990), the court concludes the government carried its burden of proving that defendant's consent to search was given freely and voluntarily. See Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (when the government seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was freely and voluntarily given).

Without going through every factor mentioned in Chaidez, see 906 F.2d at 381 (these factors should not be applied mechanically), the undersigned notes that defendant is an adult, speaks and understands English, seemed relaxed and coherent when he consented, was not questioned for a long time before consenting, and was not under arrest when he consented. Although Det. Williams gave defendant two options--consent to the search or have the property searched pursuant to a to warrant warrant based on the noxious odor emanating from the house--the cases in which courts have found an officer's "threats" to negate consent are inapposite. See, e.g., United States v. Bolin, 514 F.2d 554, 559-60 (7th Cir. 1975) (holding consent not voluntary where police threatened to arrest defendant's girlfriend if he refused to sign consent form); Waldron v. United States, 219 F.2d 37, 39 (D.C. Cir. 1955) (consent was not voluntary where police said that if they had to get a warrant, they would not be responsible for what happened to what was in the apartment, but that if the defendant were to let them in on his own free will, they would put everything back where they got it).

Whereupon,

IT IS HEREBY ORDERED that the motion of defendant to inspect and conduct testing (Doc. 13) is denied as moot.

IT IS FURTHER ORDERED that the motion of defendant to disclose confidential informant (Doc. 15) is denied.

IT IS FURTHER ORDERED that the motion of the government for a pretrial determination of the admissibility of evidence (Doc. 0) is denied as moot.

IT IS HEREBY RECOMMENDED that the motion of defendant to dismiss the indictment (Doc. 14) be denied as moot.

IT IS FURTHER RECOMMENDED that the motion of defendant to suppress evidence (Doc. 12) be denied.

The parties are advised they have ten (10) days to file written objections to this Order and Recommendation. The failure

to file objections may result in a waiver of the right to appeal issues of fact.

ORDER SETTING TRIAL DATE

As directed by the District Judge, this matter is set for a jury trial on the docket commencing June 9, 2003, at 9:00 a.m.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of May, 2003.