

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) Case No. 4:01CR173DJS(MLM)
)
 MICHAEL GOODWIN,)
)
 Defendant.)

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

This matter is before the court on the motions of the parties. Pretrial matters were referred to the undersigned United States Magistrate Judge under 28 U.S.C. §636(b). An evidentiary hearing was held on July 24, 2001. This case is set for trial on September 17, 2001. At the Evidentiary Hearing, defendant was present in person and represented by counsel, Mr. Richard H. Sindel. The government was represented by Assistant United States Attorney Antoinette Decker.

Defendant has filed three pretrial motions: Motion of Defendant to Suppress Physical Evidence [170]; Motion of Defendant to Suppress Illegally Obtained Electronic Surveillance Evidence [171-1] and To Produce Materials Related to Said Evidence [171-2]; and First Amended Motion to Suppress the Contents of Any Electronic Surveillance [206]. As an initial matter, all materials related to electronic surveillance have been produced to defendant. Therefore, that portion of the Motion to Suppress dealing with the production of evidence will be denied as moot. The court will take up the electronic surveillance by means of wiretaps in separate report and recommendation. This report and recommendation will only deal with

physical evidence seized during the execution of two search warrants and the utilization of a pen register on defendant's telephone.

I. PHYSICAL EVIDENCE

1. Motion of Defendant to Suppress Physical Evidence [170]

At the Evidentiary Hearing, the government presented the testimony of DEA Special Agents Arnie Baratti and Robert Hanson on the issue of the August 16, 2000 execution of search warrants at 8300 Racquet and at 7515 Milan. Based on the testimony and evidence adduced and having had an opportunity to observe the demeanor and evaluate the credibility of the witnesses, the undersigned makes the following findings of fact and conclusions of law.

A. 8300 RACQUET

Findings of Fact

On August 16, 2000, Special Agent Arnie Baratti was assigned to be the agent in charge at the execution of a search warrant at 8300 Racquet which was identified as defendant's residence.¹ On August 15, 2000, an Application for the Search Warrant (Gov.Ex.1) and an Affidavit in Support were presented to Magistrate Judge Lawrence O. Davis of the Eastern District of Missouri. The Application is signed by DEA Special Agent Christian Ebner, the case agent for this investigation. The application describes the residence with particularity, identifying it as a "one-story, single-family residence with a red brick front and white front door. The numbers '8300' are posted on the residence above the front door...". The Application contains a list of items to be seized in thirteen

¹ On 8/16/00, numerous search warrants were executed in connection with the overall investigation of this case which includes fourteen defendants. Because of the number of simultaneously executed search warrants, officers not previously involved in the investigation were recruited to assist. SA Baratti had not previously had an active role in the investigation.

specific categories. Judge Davis signed the search warrant at 11:17 A.M. on August 15, 2000.
Gov.Ex.1²

SA Baratti participated in the pre-execution briefing concerning the owner of the residence and what to expect. He also spoke to Bel-Nor police officers who had been to the residence before and were familiar with the layout. Shortly after 6:00 A.M. on August 16, 2000, SA Baratti knocked on the door and announced in a loud voice "Police Officer - - Search Warrant." He repeated this 5-8 times, waited approximately one minute to one minute fifteen seconds, heard no response or other noise from inside, then the door was forced. Law enforcement officers entered and SA Baratti went upstairs to the main bedroom because he had information that defendant would most likely be there. Defendant was in bed and initially appeared "groggy." The only other persons present in the house were a man and a woman in a bedroom in the basement. Defendant and the other two persons were brought to the living room and were seated there. They were handcuffed for officer safety. Defendant was advised of the purpose of the officers' presence and was given a copy of the search warrant. All items to be seized were photographed in place and SA Baratti was the designated seizing officer.

Among the items seized were the following: jewelry from the headboard in the bedroom where defendant was sleeping, documents from various locations in the house including a checkbook, bank records, telephone books and a photo album, a black duffle bag containing a triple

² The government represented at the hearing that the Affidavit in Support exceeded 100 pages. Counsel for the government stated it was not introduced into evidence because no challenge to the probable cause was made by way of a motion to quash nor was a challenge made pursuant to Franks v. Delaware, 438 U.S. 152 (1978). Counsel for defendant made no objection to these representations.

beam scale, a .22 caliber firearm, and electronic devices such as a cell phone, pager, caller ID box and computer. A dual key/combination safe was located in defendant's bedroom. SA Baratti asked defendant's assistance in opening the safe and after trying to open it himself, defendant gave the officers the combination and the key. Documents and .9 millimeter ammunition were seized from the safe.

A 1997 BMW was parked outside the residence. SA Baratti had information that it was a car frequently operated by defendant. He asked defendant if he could search the car and defendant consented. Defendant gave SA Baratti the keys to open the car. Defendant was not offered a written consent form and therefore did not sign one. SA Baratti acknowledged that the car was not covered by the search warrant and if defendant had not consented, he would not have searched the car. A roll of duct tape and some documents were seized from the car.

During the entire search, defendant remained seated in the living room. His handcuffs were moved from the back to the front for defendant's comfort. Defendant was cooperative throughout. He was not placed under arrest and remained in his residence when the officers left.

Conclusions of Law

1. Search Warrant

Search warrants to be valid must be based on a finding by a neutral detached judicial officer that there is probable cause to believe that evidence, instrumentalities or fruits of a crime, contraband or a person for whose arrest there is probable cause may be found in the place to be searched. Johnson v. United States, 333 U.S. 10 (1948); Warden v. Hayden, 387 U.S. 294 (1967); Fed.R.Crim.P. 41. The standard of probable cause for the issuing judge is whether, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found

in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983). Probable cause is “a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules.” Gates, 462 U.S. at 232. Applications and affidavits should be read with common sense and not in a grudging, hypertechnical fashion. United States v. Ventresca, 380 U.S. 102, 109 (1965). Information contained in applications and affidavits for search warrants must be examined in the totality of the circumstances presented. Gates, 462 U.S. at 230.

As noted above in footnote 2, the 100 page Affidavit in Support of the Application was not introduced because no challenge to the probable cause was made by way of a motion to quash nor was a challenge made pursuant to Franks v. Delaware, 438 U.S. 152 (1978). Counsel for defendant made no objection to the government’s representation on these points.

2. Knock and Announce

SA Baratti knocked on the door of defendant’s residence and said in a loud voice “Police Officer - - Search Warrant”. He waited one minute to one minute and fifteen seconds and hearing no response or other noise in the house, the door was forced.

18 U.S.C. § 3109 provides in part that an officer may break into a house to execute a search warrant “if, after notice of his authority and purpose, he is refused admittance.” The defendant bears the burden of establishing a prima facie case when asserting a § 3109 claim. United States v. Schenk, 983 F.2d 876, 878 (8th Cir. 1993) (quoting United States v. Mueller, 902 F.2d 336, 344 (5th Cir. 1990) (citation omitted)); United States v. DiCesare, 765 F.2d 890, 896 (9th Cir. 1985). There is no hard-and-fast time limit that the officers must wait after announcing their presence and purpose before entering the residence. Schenk, 983 F.2d at 879; United States v. Streeter, 907 F.2d 781, 789 (8th Cir. 1990), overruled on other grounds, United States v. Wise, 976 F.2d 393, 401 (8th Cir. 1992) (en banc). However, a “failure to answer a knock and announcement has long been equated with a

refusal to admit the search party and a justification for forcible entry.” United States v. Ramos, 923 F.2d 1346, 1356 (9th Cir. 1991), quoted with approval in Schenk, 983 F.2d at 879.

It is true that a very brief time cannot be equated with a refusal of admittance. See, e.g., United States v. Marts, 986 F.2d 1216, 1217 (8th Cir. 1993) (refusal cannot be inferred *merely* from the lapse of less than five seconds). However, twenty and twenty-five to sixty seconds have been found to be permissible to raise the inference of refusal of admittance. United States v. Lucht, 18 F.3d 541, 549 (8th Cir.), cert. denied, 513 U.S. 949, (1994). Here, the “knock and announce” principles of 18 U.S.C. § 3109 and the cases interpreting the statute were precisely followed. The officers waited one minute to one minute and fifteen seconds before the door was forced.

The remedy for the violation of § 3109 is generally the suppression of the illegally obtained evidence. Sabbath v. United States, 391 U.S. 585 (1968); Miller v. United States, 357 U.S. 301 (1958); United States v. Marts, 986 F.2d 1216, 1218 (8th Cir. 1993). Here there was no violation of § 3109 and the evidence seized from the house at 8300 Racquet should not be suppressed on those grounds.

3. The Safe

A search warrant authorizing the search of defined premises also authorizes the search of containers found on that premise which reasonably might conceal items listed in the warrant.” United States v. Johnson, 709 F.2d 515, 516 (8th Cir. 1983), citing United States v. Ross, 456 U.S. 798, 820 (1982) (dictum); United States v. Wright, 704 F.2d 420, 422-23 (8th Cir. 1983) (per curiam). The facts in Johnson parallel the present case. Officers searched Johnson’s residence, removed a floor safe from his bedroom and later opened it at police headquarters without his consent. The court held that “because they were authorized to open it under the warrant at that time, they did not need a second warrant to complete the search of the safe at the police station later.”

Johnson, 709 F.2d at 516. Here a safe was located in defendant's bedroom and defendant assisted the officers in opening it. This assistance can reasonably be interpreted as the equivalent of consent. However, consent was not necessary because the search of the safe was authorized by the warrant itself. Johnson, 709 F.2d at 516. The items seized from the safe should not be suppressed.

4. The BMW

SA Baratti was aware defendant operated the 1997 BMW parked outside the residence. He asked defendant for consent to search it and defendant consented. Persons may give up their Fourth Amendment rights by consenting to a search. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Such consent must be given freely and voluntarily. Id. In determining whether a consent to search was given freely and voluntarily, the court must examine the totality of the circumstances under which it is given. United States v. Mendenhall, 446 U.S. 544, 557 (1980); United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990); United States v. Lee, 886 F.2d 998, 1000 (8th Cir. 1989), cert. denied, 493 U.S. 1032 (1990). Consent to search may be given by the criminal suspect or by some other person who has common authority over the premises or item to be searched. United States v. Matlock, 415 U.S. 164, 171 (1974); United States v. Bradley, 869 F.2d 417, 419 (8th Cir. 1989). A search may be valid when based on the consent of a party whom the police reasonably believe to have authority to consent to the search even if it is later determined that the party did not in fact have such authority. Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 2800 (1990). Here defendant gave the officers the keys to open the car indicating he had authority to consent to the search.

The inquiry must then turn to whether the consent was voluntary. The burden is on the government to show that the consent was voluntary under the totality of the circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). There are numerous factors a court

should consider in determining whether consent was freely and voluntarily given. United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990). In Chaidez, the Eighth Circuit noted that:

courts should ask whether the person who consented: (1) was detained and questioned for a long or short time, . . . (2) was threatened, physically intimidated, or punished by the police, . . . (3) relied on promises or misrepresentations made by the police, . . . (4) was in custody or under arrest when the consent was given, . . . (5) was in a public or secluded place, . . . or (6) either objected to the search or stood by silently while the search occurred.

Id. at 381 (citations omitted). Here defendant was detained only for the short time it took to search his house. There is no evidence before the court of threats, physical intimidation or punishment. There is no evidence that defendant relied on a promises or misrepresentations. Defendant was not in custody. Although he was handcuffed and seated in his living room during the search, he was not placed under arrest at the conclusion of the search and remained in his home. The defendant was in his own home throughout the search and cooperated fully with the officers.

5. Scope of the Search

The Application and the Search Warrant itself contain lists of thirteen specific categories of items covered by the search warrant. A search warrant must describe with particularity the place to be searched and the things to be seized. U.S. Const. Amend. IV; Rule 41, Federal Rules of Criminal Procedure. Police officers executing a search warrant may search for and seize items described in the search warrant. They may also seize other items of evidence, contraband or instrumentalities of a crime if discovered during the reasonable course of the search. Warden v. Hayden, 387 U.S. 294, 298-301 (1967); United States v. Peterson, 867 F.2d 1110, 1112-14 (8th Cir. 1989). The discovery of such other items need not be “inadvertent.” See Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 2308-11 (1990).

The Fourth Amendment requires that Search Warrants describe the things to be seized with sufficient particularity to prevent a “general exploratory rummaging in a person’s belongings.” Coolidge v. Newhampshire, 403 U.S. 443, 467 (1971). “The particularity requirement insures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.” Id. The test is whether an executing officer reading the description in the warrant would reasonably know what items are to be seized. United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996). “In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the *types* of items to be seized.” Id.

The degree of particularity required is flexible and may vary depending on the circumstances and the type of items involved. United States v. Muckenthaler, 584 F.2d 240, 245 (8th Cir. 1978). See also United States v. Dennis, 625 F.2d 782, 792 (8th Cir. 1980) (search warrant for “certain books and records (or items of evidence) relating to the extortionate credit transaction business” held valid). “[W]here the precise identity of goods cannot be ascertained at the time the warrant is issued naming only the generic class of items will suffice because less particularity can be reasonably expected than for goods (such as those stolen) whose exact identity is already known at the time of issuance.” Dennis, 625 F.2d at 792, quoting United States v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1976); see also United States v. Coppage, 635 F.2d 683, 687 (8th Cir. 1980) (warrant found valid which authorized search for “books, records, chemical equipment, and personal papers relating to the manufacture and distribution of methamphetamine”). Although the return and inventory was not introduced as evidence, the items to which SA Baratti testified as having been seized were well within the thirteen categories listed on the Application and Search Warrant which are incorporated by reference as if fully set out herein. The items seized should not be suppressed.

B. 7515 MILAN

Findings of Fact

On August 16, 2000, SA Robert Hanson was assigned to be the lead seizing officer during the execution of a search warrant at 7515 Milan. SA Hanson's regular assignment was at Lambert Airport but as noted in footnote 1, because of the number of search warrants executed on 8/16/00, officers not previously involved in the investigation were recruited to assist. SA Hanson learned that the address on Milan was the residence of defendant's parents.

On August 15, 2000, an Application and Affidavit in Support were presented to Magistrate Judge Lawrence O. Davis.³ The Application is signed by DEA SA Christian Ebner. Gov.Ex.2. The Application describes the residence with particularity as "a one-and-one-half-story, single-family residence of red brick with a black front door. The numbers '7515' are posted on the front door of the residence." The Application contains a list of items to be seized in thirteen specific categories. Judge Davis signed the Search Warrant on 8/15/00 at 11:38 A.M. (Gov.Ex.2)

SA Hanson was briefed and went to the residence shortly after 6:00 A.M. on 8/16/00. At the front door, he called the residence from his cell phone. A female, later identified as Mrs. Goodwin, defendant's mother, answered the phone. SA Hanson asked her to come to the door which she did. He told her he had a search warrant and gave her a copy of it. (Gov.Ex.2) She said her husband was asleep in the bedroom. SA Hanson spoke to her while agents secured the residence and Mr. Goodwin came to the living room. The officers then searched for items on the list attached to the Application and Search Warrant. Items to be seized were photographed in place. All the items

³ As with the Search Warrant for 8300 Racquet, the 100 page Affidavit in Support was not introduced into evidence because no challenge to the probable cause was made by way of a motion to quash nor was challenge made pursuant to Franks v. Delaware, 438 U.S. 152 (1978). Counsel for defendant made no objection to these representations.

seized were located in the attic except the photo of defendant in the dining room. The officers seized items including paperwork in defendant's name, a bottle of anoxitol (a cutting agent for cocaine), documents, a digital scale with residue, plastic packaging material with residue, a box of sandwich sized baggies with residue and a blue plastic cup with residue. A complete inventory was left with Mr. and Mrs. Goodwin.

Conclusions of Law

1. Search Warrant

Search warrants to be valid must be based on a finding by a neutral detached judicial officer that there is probable cause to believe that evidence, instrumentalities or fruits of a crime, contraband or a person for whose arrest there is probable cause may be found in the place to be searched. Johnson v. United States, 333 U.S. 10 (1948); Warden v. Hayden, 387 U.S. 294 (1967); Fed.R.Crim.P. 41. The standard of probable cause for the issuing judge is whether, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Probable cause is "a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." Gates, 462 U.S. at 232. Applications and affidavits should be read with common sense and not in a grudging, hypertechnical fashion. United States v. Ventresca, 380 U.S. 102, 109 (1965). Information contained in applications and affidavits for search warrants must be examined in the totality of the circumstances presented. Gates, 462 U.S. at 230. As noted above in footnote 2, the 100 page Affidavit in Support of the Application was not introduced because no challenge to the probable cause was made by way of a motion to quash nor

was a challenge made pursuant to Franks v. Delaware, 438 U.S. 152 (1978). Counsel for defendant made no objection to the government's representation on these points.

2. Announcement

In this case, SA Hanson arrived at the front door and called the residence on his cell phone. He did this in order to avoid scaring the elderly residents whom he knew to be defendant's parents. Mrs. Goodwin came to the door and after being shown the Search Warrant, allowed the officers to enter. Here, the knock and announce rules as set out above at p.5-6 do not even come into play because SA Hanson called to inform the occupants of his presence, told Mrs. Goodwin why he was there and was not refused admittance. The items seized should not be suppressed on those grounds.

3. Scope of the Search

The Application and Search Warrants contain list of thirteen specific categories of items covered by the Search Warrant. The law as set out above in connection with the scope of the search of 8300 Racquet applies to this search as well. Although the Return and Inventory were not introduced in evidence, SA Hanson's testimony is clear that the officers seized only items fitting the descriptions in the list. Nothing seized at 7515 Milan should be suppressed.

II. PEN REGISTER

2. Motion of Defendant to Suppress Illegally Obtained Electronic Surveillance Evidence. [171-1]

3. First Amended Motion to Suppress the Contents of Any Electronic Surveillance [206]

Findings of Fact

The government introduced as Gov.Ex.3 an Application for a Pen Register⁴ and Enhanced Caller Identification and also introduced as Gov.Ex.4 the First Request for Extension of that Pen Register and Enhanced Caller Identification.

Conclusions of Law

“The installation and use of a pen register ... [is] not a ‘search’” within the meaning of the Fourth Amendment and therefore does not violate the constitution. Smith v. Maryland, 442 U.S. 735, 745-46 (1979); United States v. Fregoso, 60 F.3d 1314, 1320 n.3 (8th Cir. 1995).

With regard to the enhanced caller identification, the Eighth Circuit has clearly held that the caller identification service is a “trap and trace device” as that term is defined in 18 U.S.C. § 3127(4). Fregoso, 60 F.3d at 1320. A trap and trace device is “a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.” 18 U.S.C. 3127(4).

In a footnote to the Application, the government describes the caller identification service at issue as follows:

The caller identification option uses devices recently developed by wire communication providers which enable customers who receive incoming calls to observe the telephone numbers of the caller. Although caller identification devices are not provided for specifically in Title 18, United States Code, Sections 3121-3126, these devices provide much of the same information and not additional information, provided by “trap and trace” devices, which devices are provided for in the referenced statutes. Moreover, caller identification devices provide the information for less expense and in a more expeditious manner than trap and trace devices, and require less technological intervention with the subject telephone.

⁴ “A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed.” United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977).

Application for a Pen Register and Enhanced Caller Identification, Gov.Ex.3.

The court finds that the caller identification service described here is a “trap and trace” device as described in 18 U.S.C. § 3127(4) and approved by the Eighth Circuit in Fregoso.

The Order authorizing the pen register and enhanced caller identification for sixty days was signed by Magistrate Judge David D. Noce on April 14, 2000 (Gov.Ex.3) and the extension for thirty days was signed on May 30, 2000 by Magistrate Judge Mary Ann L. Medler (Gov.Ex.4).

The judicial role in approving use of trap and trace devices is ministerial in nature because, upon a proper application being made under 18 U.S.C. § 3122, “the court *shall* enter an ex parte order authorizing the installation” of such device. 18 U.S.C. § 3123(a)(emphasis added); see also United States v. Hallmark, 911 F.2d 399, 402 (10th Cir. 1990)(outlining limited judicial role in approving pen registers and trap and trace devices); In re Order Authorizing Installation of Pen Reg., 846 F.Supp., 1555, 1558-59 (M.D.Fla. 1994)(court’s role with respect to trap and trace devices limited to confirming: (1) identity of applicant and investigating law enforcement agency, and (2) certification from applicant that information sought relevant to ongoing investigation.) Furthermore, the statutory scheme (which is the same for trap and trace devices as for pen registers) does not mandate exclusion of evidence for violations of the statutory requirements. See United States v. Thompson, 936 F.2d 1249, 1249-50 (11th Cir. 1991)(information obtained from a pen register need not be suppressed despite noncompliance with statutory requirements because governing statutes, 18 U.S.C. §§ 3121-3127 do not require exclusion for violations), cert.denied, 502 U.S. 1075, 112 S.Ct. 975, 117 L.Ed.2d 139 (1992).

United States v. Fregoso, 60 F.3d at 1320-1321.

Having determined that the enhanced caller identification service is a trap and trace device, it is clear that 18 U.S.C. §§ 2510-2522 (Title III) exempts devices which satisfy the statutory definition of pen registers or trap and trace devices from its more stringent requirements. See 18 U.S.C. § 2511(2)(h)(“[i]t shall not be unlawful under [Title III] - - (i) to use a pen register or a trap and trace device” as those terms are defined in 18 U.S.C. § 2127). Fregoso, 60 F.3d at 1321; Brown v. Waddell, 50 F.3d 285, 290 (4th Cir. 1995). The application and extension in this case comply in all respects with the statutory requirements and the information obtained from the pen register and enhanced caller identification should not be suppressed.

ACCORDINGLY,

IT IS HEREBY ORDERED that the Motion of Defendant to Produce Materials Related to Such Evidence [Electronic Surveillance] is **DENIED** as moot. [171-2]

IT IS HEREBY RECOMMENDED that the Motion of Defendant to Suppress Illegally Obtained Electronic Surveillance Evidence (only in so far as it relates to pen registers and enhanced identification services) be **DENIED**. [171-1]

IT IS FURTHER RECOMMENDED that the First Amended Motion to Suppress the Contents of Any Electronic Surveillance (only in so far as it relates to pen registers and enhanced caller identification services) be **DENIED**. [206]

IT IS FURTHER RECOMMENDED that the Motion of Defendant to Suppress Physical Evidence be **DENIED**. [170]

The parties are advised that they have eleven (11) days in which to file written objections to this report and recommendation pursuant to 28 U.S.C. §636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. See Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).

/s/ _____
MARY ANN L. MEDLER

UNITED STATES MAGISTRATE JUDGE

Dated this _____ day of September, 2001.