

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES,)	
)	
Plaintiff,)	
)	No. 08 CR 728
vs.)	
)	Judge Joan Humphrey Lefkow
VICTOR GUZMAN-CORNEJO,)	
)	
Defendant.)	

**DEFENDANT’S POST-HEARING MEMORANDUM
IN SUPPORT OF MOTION TO SUPPRESS**

NOW COMES defendant Victor Guzman-Cornejo ("defendant Guzman"), by his attorney John M. Beal, pursuant to the Fourth Amendment to the United States Constitution and Fed. R. Crim. P. 41, and respectfully moves this Court to suppress all property seized from defendant Guzman’s home on July 30, 2007, as well as all further evidence derived from the aforesaid searches and seizures and all testimony relating thereto, on the grounds set forth below, and in support thereof states as follows:

1. This is a case in which the U.S. Marshals got their man. This motion does challenge that. But in the course of doing so, the marshals over-stepped the line in conducting home searches with arrest warrants.

2. On the morning of July 30, 2007, Deputy United States Marshal Frank Kruchten and other deputy U.S. Marshals had an arrest warrant for defendant Victor Guzman-Cornejo (hereinafter "Victor") for violation of supervised release. The supervised release was in a previous conviction for unlawful re-entry, N.D. Ill.

case #00 CR 972. Deputy Kruchten first went to defendant Guzman's last known address, 1817 North Gage Street in Joliet. Tracy Bernal came to the door. She is Victor's former wife and the mother of his children, Victor Jr., Chistiana, and Alexia. 7 and 10. Transcript, April 7, 2009, page 41 (hereinafter, "Tr. p __.").

3. The marshals searched the house for Victor, but he was not there. Tracy Bernal testified at the suppression hearing that while the marshals searched the house, she was never allowed to leave the kitchen. Ms. Bernal stated:

Q. And did you ask to speak to your daughters?

A. Yes, and I told them they couldn't talk to my girls. Then when I heard one of the officers talking to my daughters, I screamed from the kitchen: Shut up. Don't say anything.

Then the officer that was in the room with my girls came running out of the room, screaming in my face, saying for me to shut up because I'm interfering with an investigation, and if I say anything more they would have me arrested.

Tr. p 74.

Deputy Kruchten confirmed that it is their practice to separate people, such as Tracey and her daughters, in this type of situation, and that they did so here. Tr. p 89.

Ms. Bernal also stated that one of the deputies told her "if I didn't tell them where Victor was that they were going to arrest me and arrest my son." Tr. p 75.

4. Ms. Bernal eventually told the deputies where Victor was living. She accompanied them to that location, a house at 1110 Clement Avenue in Joliet with two living units. Ms. Bernal told them that Victor lived in the first floor apartment. Before entering the house on Clement, there was a meeting of the arrest team, which included deputy marshals and Joliet police. At that meeting, Deputy Kruchten told the team that their mission was to arrest Victor Guzman. The house was searched and Victor was not there. Tr. pp 14-15 & 18.

5. During the search, Deputy Kruchten entered the one bedroom. He testified that it contained a twin bed, a dresser with a mirror, a small night stand, and a "recliner-type" chair. Tr. p 19. He also saw mail with Victor's name on it and a photo I.D. on the night stand. The deputy further stated that when he picked up the photo I.D. he noticed two other I.D.s in the front of the night stand drawer. He said the drawer was open "three or four inches." He stated that he also saw a black sock that turned out to contain a small handgun. Tr. p 21. The deputy stated that he could not see into the sock, but only its shape. Deputy loudly called out "gun" for the other officers to hear. Tr. p 24. He took the gun out of the drawer, without further opening the drawer. Tr. p 25.

6. Deputy Kruchten also stated that he saw in the night stand drawer a yellow ziplock or sandwich bag box that "appeared to contain narcotics." More specifically, in contained "a white rock-lick substance and a green leafy substance." Tr. p 21. He elaborated that "I didn't know it was cocaine. I knew

that there was a white rock-like substance in bags in the night stand. I didn't know what it was." Tr. p 25. He further testified that he understood on the day of the hearing from the Joliet Police Department logs, that the apparent drugs were in Joliet Police Department lab bags. Also introduced into evidence at the hearing were the ziplock or sandwich bags that the drugs had been in at the house and also smaller bags that actually contained the drugs and which had been inside the larger sandwich or ziplock bags. These latter bags had undergone some sort of chemical processing. Tr. pp 31-34.

7. Deputy Kruchten then stated that he did not remove the sandwich bag box from the drawer. Instead, he asked the Joliet Police Officers present to obtain a search warrant. Tr. p 27.

8. Deputy Kruchten then left the house to pursue Victor. A short time later, he arrested Victor without incident at his job site. Tr. p 29. Victor was working on a roofing job for Rain-Away Gutters. On the day of the arrest, Victor' Jr. was also working on the same job. Tr. pp 41 & 61.

9. Victor testified that he had one prior Federal case, an unlawful re-entry case before Judge Ruben Castillo. He told Judge Castillo he would not return to the United States. Victor testified that at the time he said it, he meant it. But he did return, "for my family," both to be with them and to support them. P.51 He had a job, and with his earnings "I paid my bills, helped out with my family, my kids, gave money to my ex-wife for food for the kids. That's about it, just pay my

bills." p.62

10. With respect to the night stand drawer being open or closed, four witnesses testified that Victor never left his dresser or night stand drawers open when he left the house. Victor stated that he left them closed because the apartment, which he rented, was for sale and relators would show the apartment to prospective buyers while he was away. Also, he had two dogs who would go into the drawer if he left it open, so he always kept it closed. Tr. p 42.

11. Victor, Jr., who often spent the night in the apartment, testified that Victor kept his bedroom "organized and clean, like perfect. It had to be perfect with him." With respect to the dresser drawers, generally, and the night stand drawer, in particular, they were "always closed." Tr. pp 66-67.

12. Stacey Bernal testified that "Victor was a very clean, obsessive-type person. Everything had to be perfect, in order, in the same place, every day." She stated that the dresser drawer was always closed. Tr. p 71. In addition to Victor's obsessive nature, he had the habit of keeping the drawers closed because his two daughters often visited him in the apartment, and he had "condoms and sex stuff inside," "as well as lighters," none of which the girls were supposed to see. Tr. p 72.

13. Finally, Christina Villafuerte was Victor's girl friend at the time of his arrest. She spent the night before his arrest at the apartment. She stated that the apartment was always "very tidy, very neat, very clean," and that the night stand drawer was "always closed." Tr. p 82.

ARGUMENT

14. This motion presents two issues. The first is whether the night stand drawer open or closed. Second, even if it was open, was it "immediately apparent" that the drawer contained a gun or drugs.

15. As directly applies to the present case, "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 1379 (1980). However, in effecting such an entry, any accompanying search "may extend only to a cursory inspection of those spaces where a person may be found." *Maryland v. Buie*, 494 U.S. 325, 335, 110 S.Ct. 1093, 1099 (1990). The officers may seize unlawful items that they observe in plain view while engaged in a search of lawful scope. However, "the Seventh Circuit has articulated the following three requirements for the application of a modern plain view doctrine: (1) the officers must be lawfully present in the place from where they viewed; (2) the item must be in plain view; and (3) the item's incriminating nature was 'immediately apparent.' *United States v. Celliti*, 387 F.3d 618, 623 (7th Cir. 2004)(citing *United States v. Raney*, 342 F.3d 551, 558-59 (7th Cir. 2003))." *United States v. Gonzalez*, 2007 WL 2752392 (E.D. Wisc. 2007).

16. In the present case, the defendant first submits that the night stand drawer was closed when the deputies arrived. Defendant Guzman testified that

he left it closed that morning. Three other witnesses with personal knowledge of his regular habits testified that the night stand drawer was always left closed. If this Court also concludes that the drawer was closed, then it was unlawful for the deputy to open it and look into it.

17. Second, the deputies' actions throughout the morning demonstrated the zeal with which they acted to accomplish their mission to find and arrest Victor Guzman. They succeeded, and the arrest is not in question. However, at the Gage Street address, they searched that house and separated Tracy from her two daughters over her vociferous objection. Judge Amy St. Eve has ruled that parents who filed suit against the Evanston, Illinois police because they refused to allow parents to be present with their sons when the sons were being questioned at the Evanston Police Department stated a cause of action under 42 U.S.C. §1983. *Gregory v. City of Evanston*, 06 C 4093, 2006 WL 3718044 (N.D. Ill. Dec. 15, 2006). Thus, the refusal to allow Tracy to be present for her daughter's questioning may well have been unlawful.

18. Then, when they arrived at Clement Street, they continued with their aggressive approach in searching Victor's apartment. The defense submits that the night stand drawer was closed. But even if it was not, it was open at most 3 to 4 inches. There was no testimony that the area of the night stand was well lit. Deputy Kruchten claimed that through the narrow drawer opening he could see the yellow sandwich bag box (which, the court could see, by itself occupied much

of the supposedly visible area inside the drawer), two other of Victor Guzman's identification documents, and a black sock which turned out to contain a handgun. The deputy called out "gun!" and reached in and took out the black sock. He said that he was lead to believe that it was a gun based upon his training and experience with guns in the military and law enforcement. With respect to the drugs, he said that he saw "a white rock-like substance and a green leafy substance in the box."

19. Neither the gun nor the drugs were immediately apparent. With respect to the gun, what the deputy saw was a black sock. It certainly might have contained a gun. But it also might have contained a rock, a sex toy, or some other object. To be seizable, what is visible must be such that "would warrant a man of reasonable caution in the belief" that the object was a gun (in this instance). *Texas v. Brown*, 460 U.S. 730, 742 (1983). It was not nearly so apparent here. For officer safety reasons, deputy marshals necessarily suspect the worst and fear that anything that might be a gun is a gun. However, as the Sixth Circuit has stated, when "it was the officers experiences as law enforcement agents that led them to believe" that the items seized were contraband, that does not meet the reasonable man standard of the Fourth Amendment. *United States v. McLevain*, 310 F.3d 434, 442 (6th Cir. 2002).

20. With respect to the drugs, first of all, it is not evident how the deputy could have seen both the cocaine and the marijuana, if they were in bags stacked

on top of each other. More importantly, the drugs were in smaller bags that were themselves inside the actual ziplock or sandwich bags. The Court could see when handed the bags that the bags were quite opaque, and there could have been no way of knowing with any degree of certainty what was actually inside them. Thus, again, it was far from being readily apparent, from the narrow view into the night stand drawer, what was contained in the bags inside the bags inside the yellow sandwich box.

21. Therefore, the plain view doctrine does not support the seizure of either the gun or the drugs.

22. Finally, the government may argue that the inevitable discovery rule applies in this situation. As the Seventh Circuit has written:

Since the Supreme Court's decision in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed. 2d 377 (1984), it is well established that the inevitable discovery rule provides exception to the exclusionary rule's requirement that evidence tainted by official wrongdoing be suppressed. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means...then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received." *Id.* at 444, 104 S.Ct. at 2509. *United States v. Gravens*, 129 F.3d 974, 979 (7th Cir. 1997).

23. In this case, that exception should not apply. The marshals' mission

that day was to arrest Victor Guzman. They succeeded in doing so. They first went to Tracey Bernal's house, then Victor Guzman's house, and finally Victor's work site. If the deputy marshal had not violated the reasonable man standard of *Texas v. Brown*, not only would he not have picked up the gun, but he is most unlikely to have paid any heed to the yellow sandwich bag box. The marshals would have simply proceeded to Victor's work site. And they would not have asked the Joliet police to seek a search warrant. And absent such a search warrant, nothing would have been subsequently discovered.

WHEREFORE, defendant Victor Guzman moves this Court for an order suppressing the items seized from defendant Guzman's night stand on July 30, 2007.

Respectfully submitted,

S/ John M. Beal
Attorney for Defendant

JOHN M. BEAL, Attorney at Law
53 W Jackson Blvd., Suite 1108
Chicago, IL 60604
(312) 408-2766

CERTIFICATE OF SERVICE

I, John M. Beal, attorney, certify that I caused a copy of the above **DEFENDANT'S POST-HEARING MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS** to be served on April 16, 2009, in accordance with Fed.R.Crim.P. 49, Fed.R.Civ.P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

Executed on April 16, 2009

S/ John M. Beal
John M. Beal