UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 99-17-B
	)	
WAYNE CASHMAN	)	

Recommended Decision on Defendant's Motion to Suppress

Defendant is charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922 (g)(1) and 924 (e). Defendant now moves to suppress the seized firearm. The Court conducted an oral hearing on the issues raised in Defendant's motion on August 24, 1999. For reasons stated below, I recommend that the Court DENY Defendant's motion.

Background

On November 27, 1998, a state district court judge signed a search warrant based on Somerset County Sheriff's Department Detective Carl Gottardi's affidavit and request for search warrant. The search warrant authorized a search of "[t]he residence and property of Wayne and Linda Cashman, said residence being located at 14 Violette Avenue, in Waterville, Maine . . . ." The search warrant authorized the officers to search for controlled drugs, business records relating to the acquisition, distribution, or sale of drugs, money obtained from the sale of drugs, paraphernalia

relating to the sale of drugs, and firearms in close proximity to illicit drugs and contraband.

Prior to conducting the search, a briefing was held for those officers who were to conduct the search. At that briefing, the officers were told that Defendant was a felon.

On November 28, 1998, Maine law enforcement officers executed a search warrant on Defendant's residence located at 14 Violette Avenue in Waterville. Law enforcement officers searched Defendant's home and unattached garage. The officers seized ammunition and a small amount of marijuana from the garage. During the search Sergeant Randy Liberty of the Kennebec County Sheriff's Office discovered a lockbox under Defendant's bed in his bedroom. Unaware that other officers had found ammunition in the garage, Sergeant Liberty opened the box and discovered a loaded .22 caliber semiautomatic pistol. Defendant was later charged with being a felon in possession of a firearm.

Discussion

Defendant argues that the Court should not admit the seized firearm into evidence because: (1) the affidavit supporting the warrant did not contain sufficient information to establish probable cause to search his residence; (2) the pistol seized was outside the scope of the warrant; and (3) the officers conducting the search

needed an additional warrant to conduct a search of the lockbox. Further, in his amended motion Defendant added that the Court should suppress the evidence seized from his unattached garage because the garage was outside the scope of the warrant. We address each argument below.

A. Sufficiency of the affidavit to issue the warrant

The judicial officer's determination of probable cause is entitled to "great deference," *United States v. Ciampa*, 793 F.2d 19, 22 (1st Cir. 1986), and should be reversed only when no substantial basis existed to justify the finding of probable cause. *United States v. Sawyer*, 144 F.3d 191, 193 (1st Cir. 1993).

The Court looks at the totality of the circumstances set forth in the affidavit to determine whether the warrant was properly issued. *Illinois v. Gates*, 462 U.S. 213 (1983). This Court must determine whether, "given all the circumstances set forth in the affidavit including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there [was] a fair probability that contraband or evidence of a crime [would] be found in a particular place." *United States v. Caggiano*, 899 F.2d 99, 102 (1st Cir. 1990) (quoting *Gates*, 462 U.S. at 238-39).

Defendant maintains that the information averred to in the affidavit is insufficient to support a finding of probable cause to search his home. Upon reviewing the affidavit the Court disagrees. The information before the judicial

officer who issued the warrant was that (1) an informant told police that it observed Defendant smoking marijuana with Tuttle, a suspected drug dealer, at Tuttle's hotel room; (2) on a separate occasion, the same informant saw Defendant approach Tuttle at a bar and say "let's go, someone is waiting outside"; (3) another informant, referred to in the affidavit as CI-98-96, told police that Defendant was a major supplier of drugs to Tuttle and demonstrated some personal knowledge of Defendant's business dealings by knowing who purchased Defendant's restaurant and knowing that Defendant sold his vehicle to Tuttle; (4) CI-98-96 accurately described Tuttle and where Tuttle lived; and (5) over several days in November 1998, police observed what appeared to be drug trafficking at Tuttle's room.

The Court is satisfied that, viewing the totality of the facts before the judicial officer, there existed a fair probability that evidence of contraband would be found at Defendant's residence. Further, the Court is satisfied that even if the warrant was deficient, the evidence seized should not be excluded because the officers conducting the search reasonably relied in good faith on the judge's determination of probable cause. *United States v. Leon*, 468 U.S. 897, 922 (1984).

i. Franks hearing

The Court is satisfied that Defendant is not entitled to a *Franks* hearing. *Franks v. Delaware*, 438 U.S. 154 (1978). *Franks* requires the Court to hold a

hearing once Defendant makes a substantial preliminary showing that: (1) the affiant made a false statement knowingly, intentionally, or with reckless disregard for the truth, and (2) the false statement is necessary for the finding of probable cause." *United States v. Scalia*, 993 F.2d 984 (1st Cir. 1993) (quoting *United States v. Paradis*, 802 F.2d 553, 558 (1st Cir. 1986)). The Court reviewed the affidavits submitted by Defendant and is satisfied that Defendant has not made a substantial preliminary showing that the affiant made the alleged false statements knowingly, intentionally or with reckless disregard for the truth.

B. The pistol was seized within the scope of the warrant

Defendant next maintains that because drugs were not found in his bedroom, and the warrant only authorized the search of firearms in close proximity of illicit drugs and contraband, the firearm was illegally seized by the officers. The Court, however, agrees with the Government that under the plain view doctrine the seizure of the pistol was lawful, irrespective of its proximity to any illegal drugs. Under the plain view doctrine an officer may seize a piece of evidence if the officer's presence at the point of discovery was lawful, and the evidentiary value of the item seized is apparent. *United States v. Robles*, 45 F.3d 1, 6-7 (1st Cir. 1995).

Here, the Government searched Defendant's residence including three lockboxes located under Defendant's bed in his bedroom. Upon opening one of the

lockboxes the officer discovered a loaded pistol. It is clear that the officers had authority to search the contents of the lockboxes because it was possible that illegal drugs or contraband could be found in them. *See Robles*, 45 F.3d 1, 6-7 (stating that a lawful search of premises for illegal firearms extends to closets, drawers and containers where the firearm may be found). Therefore, the officer's presence at the point of discovering the firearm in the lockbox was legal. Second, prior to searching Defendant's residence, the officer was made aware at a briefing that Defendant was previously convicted of a felony. The officer called in Special Agent MacMaster, a member of the Violent Crimes Task Force, who was also aware of Defendant's felony conviction. Because both officers knew (1) that Defendant is a felon, and (2) that it is a federal and state crime for a felon to possess a firearm, the evidentiary value of the pistol was apparent. Therefore, the seizure of the pistol was lawful under the plain view doctrine.

C. The search of the lockbox

As stated above, the proposition set forth in *Robles* makes clear that the search of the lockbox did not require a second warrant. *Robles*, 45 F.3d 1, 6-7. Therefore, the officers did not need to obtain a second warrant to search the lockbox.

D. Search of the unattached garage

The search warrant provides that the officers search:

> [T]he residence and property of Wayne and Linda Cashman, said residence being located at 14 Violette Avenue, in Waterville, Maine, said residence being more fully described as a single family dwelling, wood framed with light colored siding . . . .

Defendant moves to suppress evidence found in the garage because the warrant only allowed the "residence and property," to be searched. Further, Defendant argues that the warrant specifically permitted that the "single family dwelling" be searched and made no mention of the unattached garage.

The Court refuses to apply the hypertechnical reading that Defendant invites it to do. *See United States v. Bonner*, 808 F.2d 864, 868 (1st Cir. 1986) ("[S]earch warrants and affidavits should be considered in a common sense manner, and hypertechnical readings should be avoided.") The First Circuit has explicitly stated that a search of one's property at a named address includes those buildings situated on that property. *Id.* Therefore, the unattached garage was properly searched.

Conclusion

For the reasons stated above, I recommend that the Court DENY Defendant's motion to suppress.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with

a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated on: September 3, 1999