UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 03-45-B-W
	)	
CHRISTOPHER LAWLOR,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Christopher Lawlor has moved to suppress any evidence seized as a result of a warrantless search of his residence in Enfield, Maine. (Docket No. 10.) Both parties agree that the facts giving rise to this motion can be found in Maine State Police Trooper Thomas D. Fiske's report of the investigation (Docket No. 12, Ex. A) and in Fiske's affidavit in support of a request for a state search warrant (Id., Ex. B). Therefore no evidentiary hearing has been requested by either party. Based upon the undisputed facts set forth below, I recommend that the court **GRANT** the motion.

Proposed Statement of Facts

Christopher Lawlor and Christopher Tomah apparently spent the night of May 29, 2003, drinking at Phil Ryan's home in Enfield, Maine. The two extremely intoxicated men returned to Lawlor's home during the early morning hours and got into a heated argument. Their shouting woke up Tomah's girlfriend, Ann Delaite, who was sleeping upstairs in the Lawlor residence. Delaite could not hear the details of the argument because the two men were outside. She heard a gunshot outside the house. She ran outside to investigate and found the two men on the lawn

still arguing. They refused to cease in spite of her pleas that they do so. Delaite then took a motor vehicle and drove to a friend's house on the Dodlin Road in Enfield.

At the same time (approximately 7:00 a.m.) Andrew McLaughlin was working at the Enfield golf course across the street from the Lawlor residence. He observed the two men scuffling outside the residence. He saw Tomah in a ditch struggling to get to his feet. McLaughlin then heard a shot fired and called the police. He did not see who fired the shot because a building obstructed his line of sight to the house. However, he did see Tomah standing in the driveway with his hands up.

The state police barracks received McLaughlin's call at 6:58 a.m. and dispatched state trooper Thomas Fiske to the scene. Fiske arrived at the Lawlor residence at 7:22 a.m. As he came upon the scene he observed two men outside of the residence in "varying stages of disarray." Both men were yelling threats and obscenities and challenging the other to fight. Tomah was standing in the driveway near the road and Lawlor was standing in the driveway near the home, holding a wooden club approximately three and one-half feet long. The club was cocked back over his shoulder apparently ready to strike. Fiske ordered both men to the ground and handcuffed them both for his own safety. Fiske observed a female, later identified as Ann Delaite, standing in the doorway of the home.[1]

Within moments Trooper Barry Meserve arrived on the scene. Fiske observed that there were two spent twelve-gauge casings on the ground in front of the entrance to the house. He asked Lawlor where the gun would be found and Lawlor denied knowledge of any guns. Lawlor then asked Fiske which gun he was talking about because there were several guns in the house. Fiske said that he wanted the gun that had just been used and Lawlor responded by shrugging his

[1] Apparently she returned to the scene from her friend's house.

shoulders. Fiske then entered the home "to locate the firearm to prevent harm to anyone else and to make sure there were no assailants in the home."

Fiske entered the kitchen, proceeded through the living room, and located the gun in a smaller room off of the living room. The shotgun was lying on the floor. The barrel had been removed from the receiver and was lying next to it. Fiske looked into the bore and could smell gunpowder and could tell that the gun had been fired recently. Fiske seized the weapon and proceeded back outside. Fiske reports that while he was in the house Lawlor told Trooper Meserve that the gun he used was a sawed off shotgun and that he would show the trooper where it was located.

While Fiske was in the kitchen he observed a straw with a white powdery substance on it. While in the room where he found the gun Fiske looked into an adjoining room and observed a plate with a substantial amount of white powder on it having the same look and consistency as cocaine. Fiske knew based upon his training and experience that straws were often used to snort or ingest cocaine. Armed with these facts Fiske obtained a state search warrant to search the entire residence for drugs. Several items were seized including drugs and paraphernalia.

Discussion

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

> To determine whether there is an exigency sufficient to justify a warrantless search and seizure, the test is "whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." [United States v.] Wilson, 36 F.3d 205, 209 (1st Cir. 1994) (quoting United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980)) . . . . This necessarily fact-based inquiry . . . requires that we consider factors including the gravity of the underlying offense, whether a delay would pose a threat to police or the public safety, and whether there is a great likelihood that evidence will be destroyed if the search is delayed until a warrant can be obtained.

United States v. Bartelho, 71 F.3d 436, 442 (1995) (some citations omitted). The Government seeks to justify this warrantless search for the firearm on four separate and distinct grounds: (1) as a protective sweep following an in-home arrest under the doctrine articulated in Maryland v. Buie, 494 U.S. 325 (1990); (2) as a search similar to one associated with the apprehension of a fleeing felon, such as in Warden v. Hayden, 387 U.S. 294, 298-99 (1967); (3) as a "quick visual search" while police secure a residence and obtain a search warrant, such as in Segura v. United States, 468 U.S. 796, 810 (1984); and finally (4) as a search of a residence conducted to ensure public safety, such as was approved in Mincey v. Arizona, 437 U.S. 385, 392 (1978). For the reasons that follow, I believe that this search does not fall within any of these exceptions.

1. Maryland v. Buie

A "protective sweep," by definition, is "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Buie, 494 U.S. at 327. The Supreme Court has defined the parameters of such a search in the following fashion:

> We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in Terry and Long, and as in those cases, we think this balance is the proper one.

Id. at 334.

The search in this case does not fall within this exception by any stretch of the imagination. The record reflects absolutely no facts capable of supporting a rational inference that anyone was involved in this fracas except the three people plainly visible to the officers outside the home, two men in handcuffs and a woman standing in the doorway.[2] The house was not in the area "immediately adjoining the place of arrest from which an attack could be immediately launched." Of course, Officer Fiske had at least an articulable suspicion that a firearm would be found in the house based upon the trail of shotgun casings, the statements of the participants, and the information provided by Delaite. However, there is not one articulable fact in this case to support the officer's after-the-fact conclusory statement that he entered the home to "to prevent harm to anyone else and to make sure there were no assailants in the home." He did not see a curtain flutter in the upstairs bedroom, he heard no suspicious noises from inside the house, there was no trail of bloody footprints leading into the home (indeed no one had even

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[2] Compare, cf. Crooker v. Metallo, 5 F.3d 583, 584 (1st Cir. 1993) (holding that officers were entitled to qualified immunity against § 1983-Fourth Amendment claim based on a protective sweep, where the facts established that officers executing an arrest warrant against plaintiff at plaintiff's premises had reason to believe that plaintiff's "home harbored [another] individual . . . who 'posed a danger to the officers or others.'") (quoting Buie, 494 U.S. at 327).

The government cites United States v. Daoust, 916 F.2d 757 (1st Cir. 1990), in conjunction with Buie. The Daoust opinion does not advance the issue. As in Crooker, the officers' entry into the premises in Daoust was authorized by a warrant and their protective sweep of the premises was supported by articulable suspicion that someone might be present on the scene and pose a danger to them. Id. at 758-59. The officers' reasonable concern was that Daoust himself might have been sleeping in his bedroom at the time they entered to conduct their authorized search for a gun in the kitchen, thus the need for the "protective sweep." Id. at 759.

been injured in this fracas), nor was there any other fact in the appearance or demeanor of the three participants to give rise to any suspicion that other assailants lurked in the area. Therefore, there was no basis for a reasonably prudent officer to believe "that the area swept harbored an individual posing a danger to the officer or others."[3] Id. at 327. If the court approved this search as a "protective sweep," it would really be creating a new exception to the requirement that officers obtain a search warrant when searching for evidence of a crime. That new exception would be that anytime there is a report that shots have been fired somewhere in the general vicinity of a house and the firearm is not discovered outside the house, officers may search the residence without any need to articulate a single exigent circumstance.

2. Warden v. Hayden

In Warden v. Hayden the Supreme Court briefly acknowledged that it is not an unreasonable warrantless search for police to pursue a fleeing felon into premises within minutes of his arrival there and shortly after the commission of a felony, in light of the "exigencies of the situation." 387 U.S. at 298-99 (quoting McDonald v. United States, 335 U.S. 451, 456 (1948) ("[T]he Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.")). The facts of Hayden presented a rather thorough search of the defendant's premises within minutes of the commission of an armed robbery, during which police seized a number of items of evidence,

[3] See also Buie, 494 U.S. at 334 ("[W]e hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.") (emphasis added). In Buie, the police were executing an arrest warrant and the evidence targeted in the motion to suppress was discovered after police had apprehended Buie outside the entrance to his basement, by an officer who "swept" the basement to see whether anyone else was there. Id. at 328. In the instant case, although Lawlor and Tomah had both been subjected to a seizure at the time Lawlor entered the premises, neither had been arrested on probable cause.

including firearms and clothes matching witnesses' descriptions of the robber, which were hidden in various locations throughout the house, including a toilet flush tank, a washing machine and underneath a mattress. Id. at 298. The Court concluded that the items should not have been suppressed because all were discovered in locations that might have hidden weapons. Id. at 299-300. The characteristics of this search obviously have nothing to do with the characteristics of the search conducted in the instant case. Trooper Fiske was not pursuing a fleeing felon into the premises and there is no evidentiary basis in his affidavit to support a finding that evidence of a gun would have been lost absent an immediate entry into the premises or that the mere existence of a gun on the premises gave rise to an exigency sufficient to override the Fourth Amendment presumption that a warrantless search of premises is unreasonable.

3. *Segura v. United States*

Chief Justice Burger demarcated the holding of Segura v. United States quite narrowly when he wrote, "[W]e hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures." 468 U.S. at 798. The entire premise of the Segura case rested not only upon the fact that the arrest was made inside the home, but also that even if the first warrantless entry were illegal, the evidence seized was in no way tainted by the illegal entry. Id. at 799 (involving evidence discovered during a premises search conducted the day after an illegal entry but "pursuant to [a] valid search warrant issued wholly on information known to the officers before the entry into the apartment," and concluding that such evidence is not the "'fruit' of the illegal

entry because the warrant and the information on which it was based were unrelated to the entry").

Segura concerns itself with the distinction between probable cause to seize property and probable cause to search a residence. It seems clear to me that if the facts in the present case were adjusted slightly, and the officers had merely infringed Ms. Delaite's possessory interest in the home by securing the exterior of the dwelling until they obtained a warrant, the subsequent search would have had all of the earmarks of "reasonableness" necessary to pass Fourth Amendment scrutiny. They clearly had probable cause to search the residence for the missing firearm. However, unlike the situation posed by Justice Black in his dissent in Vale v. Louisiana, 399 U.S. 30, 36 (1970), the troopers in this case had absolutely no reason to believe that anyone inside the house would destroy evidence during the time it took to obtain a valid warrant. They could not draw that inference in this case for two very sound reasons. First, the two primary actors in this melodrama were handcuffed and within the control of the two officers, Ms. Delaite was outside of the home and there was no reason to believe that anyone else was inside the residence. Second, even if there were an unknown additional party inside the house, his or her presence neither posed a threat to the officers outside the residence nor created any real danger of destruction of evidence. After all, the evidence sought in this case was a firearm, hardly an object capable of being easily destroyed if the premises were secured for a few hours until a warrant could be obtained.

4. Mincey v. Arizona

The government observes that "[t]he police may also search a residence in which a violent crime has occurred if they reasonably believe victims or dangerous persons are present," citing Mincey v. Arizona, 437 U.S. 385 (1978). In Mincey v. Arizona, the Supreme Court

rejected the suggestion that an exception to the warrant requirement ought to be recognized to permit comprehensive searches of premises when police are investigating a homicide that occurs on the premises. 437 U.S. at 389-91. Although it recognized that a warrantless search of limited scope could be conducted within a reasonable time of the homicide event,[4] the Court found the search at issue could not be justified "simply because a homicide had recently occurred there." Id. at 395; see also id. at 394 (finding that "there were no exigent circumstances in [the] case."). Mincey does not advance the issue presented herein because there is no basis in the record to support a reasonable belief on the part of Trooper Fiske that either a victim or dangerous person was inside of the premises.[5]

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[4] Mincey, 437 U.S. at 392 ("[W]hen the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.").

[5] The several other precedents cited by the government are also unpersuasive. See United States v. Wihbey, 75 F.3d 761 (1st Cir. 1996) (holding that warrantless entry into premises was justified in course of drug dealing sting operation because probable cause existed to arrest owner of premises and the delay of obtaining a warrant would cause defendant to become suspicious and possibly flee or conceal or destroy evidence); Bartelho, 71 F.3d 436 (1st Cir. 1995) (holding that warrantless entry into premises was justified where officers had reason to believe defendant was present in premises, had recently threatened his domestic partner with a firearm, and would pose a risk to the community because the premises were situated on a busy highway where a Fourth of July parade was about to begin); United States v. Lopez, 989 F.2d 24, 27 (1st Cir. 1993), cert. denied, 510 U.S. 872 (1993) (holding that an exigency existed to search premises for a sawed-off shotgun following an arrest because the premises housed multiple tenants who shared communal facilities and the gun butt was observed "with little effort" in the communal bathroom); United States v. Arch, 7 F.3d 1300 (7th Cir. 1993) (holding that the observation of blood and knives in a hotel room formerly occupied by an erratic individual justified a warrantless entry and search of the room for injured persons); United States v. Doe, 819 F.2d 206 (9th Cir. 1985) (holding that warrantless entry into premises to obtain a firearm was justified where officer arrived to find a resident lying dead on the front porch from a gunshot wound); United States v. Jones, 635 F.2d 1357 (8th Cir. 1980) (holding that the report of repeat gun firing by defendant on town main street and disappearance into his apartment, coupled with a prior felony conviction from a shooting incident, a refusal to answer police officers' requests that he exit the building and an acrid smell of smoke emanating from the premises justified the decision to break down the door and enter defendant's premises and to conduct a search limited to finding the source of the smoke). One case cited by the government seems to be more narrowly on point, but only upon cursory examination. In United States v. Holloway, 290 F.3d 1331 (11th Cir. 2003), cert. denied, 123 S. Ct. 966 (2003), the court held that police officers were justified in searching premises in response to two 911 calls concerning gunfire after securing the individuals discovered on the scene. The defendant was later convicted for unlawful possession of a firearm by a felon based on the plain view discovery of a firearm during the search. However, the facts reveal that the firearm was discovered not in the premises, but on them, leaning against the side of the home approximately three feet from where the defendant had been standing when the officers first arrived on the scene. 290 F.3d at 1333. Furthermore the actual warrantless entry into the home was at least partially justified by the officers' observations of a small child inside the residence. Id. at 1332. Such distinctions make Halloway unpersuasive in the context of the instant case.

Conclusion

Because "it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," none of which is presented here, I **RECOMMEND** that the Court **GRANT** the motion to suppress. Mincey, 437 U.S. at 390 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

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) 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.

October 23, 2003

/s/ Margaret J. Kravchuk
United States Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:03-cr-00045-JAW-ALL
Internal Use Only

Case title: USA v. LAWLOR
Other court case number(s): None **Date Filed:** 07/01/03
Magistrate judge case number(s): None

Assigned to: JUDGE JOHN A. WOODCOCK
Referred to:

Defendant(s)

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Pending Counts	**Disposition**
UNLAWFUL TO MAKE A FIREARM IN VIOLATION (Making an Unregistered Short Barreled Shotgun; 26:5861(f), 5871) (1)	
UNLAWFUL TO RECEIVE A FIREARM NOT REGISTERED (Possession of an Unregistered Short Barreled Shotgun; 26:5861(d), 5871) (2)	

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Plaintiff

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