IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARIC BOTHUN,

Defendant.

REPORT AND RECOMMENDATION

03-CR-083-C

REPORT

Before the court is defendant Aric Bothun's motion to suppress evidence. *See* Dkt. 23. On December 6, 2002, the DEA seized a package sent to Bothun's private mailbox via Federal Express. Bothun claims that this seizure was unreasonable and seeks to suppress all evidence derived from it. For the reasons stated below I am recommending that this court deny Bothun's motion.

On September 9, 2003, the court held an evidentiary hearing on Bothun's motion. Having considered the witness's testimony and demeanor, and having considered the parties' exhibits, I find the following facts:

Facts

In the fall of 2002, a man named Greg Vlad approached the DEA in this district to suggest a deal. Vlad had criminal charges pending in three Wisconsin. He also claimed to

have valuable information about local drug trafficking that he offered to divulge if the DEA would bring his cooperation to the attention of the state prosecutors. The DEA agreed.

Vlad provided first- and second-hand information about Aric Bothun to DEA Special Agents Lou Gade and Jerome Becka. Among other things, Vlad told the agents that Bothun had packages of methamphetamine, heroin and MDMA mailed to him from Las Vegas. According to Vlad, Bothun received these packages at a mailbox Bothun rented from a Mailboxes, Etc. franchise that Vlad could not pinpoint. Agent Gade followed up by examining Bothun's telephone records, which reflected telephone calls to a Mailboxes, Etc. franchise in Monona, Wisconsin.

On December 6, 2002, Agents Gade and Becka visited this franchise during business hours to ask whether Bothun actually rented a mailbox there. At this early stage of their investigation the agents were not looking for, nor did they expect to find any packages to Bothun at the store. The agents spoke with the manager, Dick Meyer, who continued his work while he answered their questions.

Meyer identified a photograph of Bothun as his customer and stated that Bothun rented Post Office Box 279 in the name of his business, S&A Computers. Meyer reported that Bothun's company received packages about once a week from Las Vegas. Meyer volunteered that there was a package in Bothun's mailbox at that time. As they continued to talk Meyer retrieved the package and placed it on the counter in front of the agents. The agents had not asked Meyer if Bothun or S&A Computers had any packages waiting to be

picked up, nor had they asked Meyer to retrieve the package and show it to them. The agents were "kind of shocked" at their good fortune because they had not visited the franchise intending or expecting to discover a package waiting for Bothun.

The package was a cardboard envelope sent via Federal Express from Las Vegas to S&A Computers. There was a bulge in the middle that the agents pressed. It felt lumpy and sounded crunchy, traits consistent with a package containing any of the drugs listed by Vlad, but the agents could not be sure from this whether in fact the envelope contained drugs.

The agents maintained control of the package within the store and called for a drug sniffing dog and its handler. The dog and handler arrived within 30 minutes. At the handler's direction, the agents put Bothun's package on the floor with six similar packages. The dog alerted on Bothun's package.

The agents then put Bothun's package back in his mailbox, hoping that he would show up that afternoon to retrieve it. He did not, so the agents left at about 5:00 p.m., taking Bothun's package with them, intending to obtain a search warrant for it. They left a business card in Bothun's box, hoping he would call them.

Bothun *did* call the agents and consented to a search of the package. (Actually, he denied that it was his package and told the agents to do whatever they wanted, but this is unimportant for suppression purposes). The agents found 117 grams of methamphetamine that form the basis of the charges against Bothun in this court.

Analysis

At the evidentiary hearing Bothun, by counsel, explicitly disclaimed any challenge to the consent search that followed the agents' discovery and examination of his package. In his initial brief, Bothun strayed from this disclaimer, arguing both lack of probable cause to search and lack of voluntary consent. The government cried foul, and in his reply Bothun does not mention these issues again. So these issues are not before the court. What remains are Bothun's claim that Meyer seized his package as an agent of the government, and that the agents' subsequent examination of the package was independently unreasonable.

I. Meyer was not a government agent

Let's start by determining whether agency actually matters. If Bothun's package still had been in the mail stream, then it would have been reasonable for law enforcement agents *sua sponte* to divert it for perusal by a drug dog. *United States v. Ganser*, 315 F.3d 839, 843 (7th Cir. 2003) (upon reasonable suspicion that package contained contraband, delaying delivery four days to investigate was not unreasonable under the circumstances). An informant's accurate tip that the suspect would receive a letter of a certain type from a certain state creates reasonable suspicion, even if the CI gets other details wrong. *Id.* Once a trained drug dog alerts to a letter, reasonable suspicion elevates to probable cause. *Id.*

But in this case, Bothun's package already had been delivered to his private mailbox, so it no longer was in the mail stream. "There is substantial support for the conclusion that

when the postal carrier delivers an envelope to the current residence of the address, the 'mail' is at an end." *United States v. Palmer*, 864 F.2d 524, 525 (7th Cir. 1988). Unless Mailboxes Etc. has actual (*i.e.*, contractual) authority to surrender its customers' mail to police, then it seems that those customers have a legitimate expectation of privacy in their delivered mail. Because the parties only submitted the first and third pages of the operative contract, *see* dkt. 23 at 310-11, this path of analysis is blocked. On this record, then, Meyer's agency matters because there is a fourth amendment barrier between the reasonable suspicion supplied by Vlad and the probable cause supplied by the narcotics dog.[1] In other words, the inevitable discovery doctrine, (*see United States v. Brown*, 328 F.3d 352, 356-57 (7th Cir. 2003)) cannot save this search.

But wouldn't Bothun's subsequent consent to search the package be sufficient to trigger the inevitable discovery doctrine? What if Meyer merely had told the agents that Bothun had just received an envelope from Las Vegas but did not retrieve it or make it available to the agents for a canine examination? Would Agents Gade and Becka then have left a note for Bothun asking him to call them, and if he called would they then have asked permission to search his package? Perhaps, but in the absence of credible testimony to this effect, it would be inappropriate for the court to speculate. So, we're back to the propriety of Meyer producing the package for inspection.

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[1] The interstitial manipulation of the package by the agents likely was unreasonably intrusive, *see United States v. Allman*, 336 F.3d 555, 556 (7th Cir. 2003), but it is irrelevant to suppression because of the inevitable discovery doctrine *if* it was reasonable for Meyer to make the package available to the agents in the first place. The subsequent canine sniff was not unreasonably intrusive, and there is no indication that the agents only requested the dog's assistance because of what the package felt like.

A seizure by a private party does not implicate the Fourth Amendment unless the party is acting as an "instrument or agent" of the government. *United States v. Crowley*, 285 F.3d 553, 558 (7th Cir. 2002). It is a defendant's burden to prove that a private party acted as a government agent. *Id.* In determining whether a private party acted as an "instrument or agent" of the government, this court must consider the totality of the circumstances, chief among which are whether the government knew of and acquiesced in the questioned conduct, whether the private party's purpose in conducting the search was to assist law enforcement, and whether the government requested the action or offered the private actor a reward. *Id.* A private party's internal motivation to assist the police does not convert his action to police action:

> Concern about the effects of crime on the public at large is not a vice which one must assume signifies a conspiracy with the government, but a cherished, commonly held, and wholesome virtue. . . . Private parties may, of their own accord, pursue the same objectives they have set for their elected officials without acquiring the legal status of governmental agent.

Id. at 559, citations omitted.

Agent Becka's credible and uncontradicted testimony was that Meyer provided Bothun's package to them without any prompting whatsoever from the agents. Indeed, the agents were unaware that a package was present until Meyer advised them and plunked it down before them. They did not know of, request, or acquiesce in Meyer's retrieval of the package; they were mere bystanders to this serendipitous breakthrough in their case. Agent

Becka opined that Meyer probably was trying to help out the agents, but as noted in *Crowley*, this does not make Meyer a government agent because Meyer decided to do this on his own.

Bothun disagrees, contending that Meyer clearly was acting at the agents' behest, but this contention is unsupported. I suppose that the agents "caused" Meyer to produce Bothun's package in the sense that they even showed up at his business in the first place, prompting Meyer to volunteer his assistance, but that's not the sort of causation that matters for fourth amendment purposes. Bothun needs to establish that the agents demanded, directed, induced or asked Meyer to produce the package. He did not establish any of these things through the DEA-6a's or Agent Becka's testimony. If Bothun thought Meyer would have testified favorably to his cause, then Bothun should have subpoenaed him as a witness. The uncontradicted evidence is that Meyer did not disclose Bothun's package in response to any explicit or implicit request or demand from the agents. It was Meyer's own choice, as store manager and private citizen, to assist the investigation in this fashion.

II. The agents' subsequent examination of the package was not unreasonable

Bothun argues that once Meyer placed the package on the counter, the agents violated Bothun's rights by moving it to the ground and bringing in the drug dog for a sniff. Bothun is not entitled to suppression on this claim because the store manager displayed apparent authority to grant permission for the canine examination and the additional examination did not delay Bothun's receipt of the package. Bear in mind that we are not talking about

apparent authority to consent to an actual search of the package, but about the apparent authority to allow the agents to move the package around in order for a drug dog to conduct a non-tactile investigation of the package's aroma. This might be characterized more accurately as a consensual "seizure" than as a "search," but that wouldn't change the analysis. Perhaps such handling of Bothun's package after its initial production does not implicate the fourth amendment at all, but prudence militates against casually dismissing Bothun's privacy interests in the package. Assuming tat Bothun retained some privacy interests at this juncture, on these facts he cannot win.

The probable cause and warrant requirements of the Fourth Amendment do not apply when an individual with apparent authority to consent to a search (or seizure) does so. *See United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000). To assess whether apparent authority exists, one looks for indicia of actual authority. *United States v. Rosario*, 962 F.2d 733, 738 (7th Cir. 1992). In the context of room searches, a third party with common authority over the premises sought to be searched may provide such consent. Common authority is based upon mutual use of property by persons generally having joint access or control. *United States v. Aghedo*, 159 F.3d 308, 310 (7th Cir. 1998).

In the instant case, although Meyer could not have authorized the agents to open Bothun's package, *cf. United States v. Melgar,* 227 F.3d at 141-42 (room search), what Meyer did here was less intrusive and apparently within his authority as store manager: he allowed the agents to move Bothun's package around the store premises while they conducted their

follow-up investigation prior to Bothun coming in to claim it. It was reasonable for the agents to conclude that Meyer was authorized to allow them to examine Bothun's package from: 1) Meyer's position as store manager; 2)Meyer's matter-of-fact presentation of the package to them for review; and 3) Meyer's (apparent) lack of protest as they moved the package around his business and then brought in the dog.

Thus, to the extent that these additional actions by the agents at the store even raise fourth amendment concerns, it was reasonable for the agents to act on the basis of Meyer's apparent authority. *See United States v. Rodriguez*, 888 F.2d 519, 523 (7th Cir. 1989)(another room search case). Requiring agents to dig beneath the surface of the information furnished by the person giving consent would make the outcome of the search depend on niceties of property law far removed from the concerns of the Fourth Amendment. *Id.*

> Suppressing evidence because of what the police did not know at the time, even though their acts were justified on the basis of what they did know, would inject a random element into Fourth Amendment jurisprudence without serving any of the functions of the exclusionary rule. Denying police the ability to act on the basis of apparent authority would not deter improper conduct; it would instead deter acting on the basis of consents.

888 F.2d at 523.

The bottom line is that Meyer was not acting as a government agent when he produced Bothun's package for inspection and he had at least apparent authority to allow a narcotics dog to examine the package. The agents acted reasonably at all times and Bothun is not entitled to suppression of any evidence.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Aric Bothun's motion to suppress evidence.

Entered this 9th day of October, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge