IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

NICHOLAS P. DiMODICA,

Defendant.

ORDER AND OPINION

05-CR-0064-C-01

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Defendant Nicholas P. DiModica has moved for an order requiring the United States Magistrate Judge to receive further evidence in this case or alternatively, directing the magistrate judge to reconsider the legality of the search of defendant's house in light of the United States Supreme Court's opinion in Georgia v. Randolph, 126 S. Ct. 1515 (2006). The government opposes the motion on procedural grounds, contending that this court has no jurisdiction to reconsider a case once the Court of Appeals for the Seventh Circuit has decided the appeal from that case, as it has in this case. The government is correct.

BACKGROUND

The criminal charges against defendant grew out of an unusual congeries of

circumstances. On March 17, 2004, defendant's wife, Anita, met with an officer from the Wisconsin Department of Justice and told him that defendant had been abusing her for years, that he had drugs, drug paraphernalia and guns in their house and that he was a convicted felon. Later that evening, when Anita filed a complaint against her husband for abuse, the local police determined that probable cause existed to arrest defendant but did not obtain a warrant. Instead, they obtained Anita's consent to a search of the house, her house key and a map she had drawn with the bedroom marked. The Department of Justice officer and the local police officer drove to defendant's home at about 11:00 p.m., anticipating that he would be there. Their plan was to tell defendant that his wife had been injured in an automobile accident and hope that he would invite him inside, where they planned to arrest him. As often is the case in Wisconsin in mid-March, blizzard conditions prevailed.

When the officers reached the house, defendant opened the door and the officers went inside, where they waited for defendant to get a shirt. As soon as he returned, they arrested him for domestic abuse, removed him from the scene and conducted a search that turned up firearms, among other items.

The parties disputed the circumstances under which the officers entered defendant's residence. Defendant testified at the evidentiary hearing before the magistrate judge that he did not invite the officers inside but told them to stay out; the officers testified that defendant agreed to let them in.

Defendant was charged in federal court as a felon in possession of three firearms, in violation of 18 U.S.C. § 922(g). He moved to suppress evidence of the firearms on the ground that law enforcement officers had searched his house in violation of his rights under the Fourth Amendment to the United States Constitution. After holding an evidentiary hearing, the magistrate judge issued a report and recommendation on August 5, 2005, recommending that defendant's suppression motion be denied under the authority of United States v. Matlock, 415 U.S. 164 (1974). In Matlock, the defendant had been arrested in the yard outside his house and placed into a nearby squad car while officers secured permission from one of defendant's co-tenants to search the house in which he was living. The subsequent search was held to be reasonable.

The magistrate judge's recommendation was adopted by the court. Twenty days later, defendant pleaded guilty to the indictment, reserving his right to appeal the denial of the suppression motion.

Defendant filed a timely appeal from his conviction and was granted a stay of briefing pending the Supreme Court's decision in Georgia v. Randolph, 286 S. Ct. 1515, which issued in March 2006. In Randolph, the defendant and his wife were both present when officers sought permission to search the residence. The defendant objected to the search; his wife agreed to it. The Court held the subsequent search unreasonable, holding that when "a potential defendant with self-interest in objecting [to a search] is in fact at the door and

objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." Id. at 1527.

Defendant completed his briefing in the court of appeals, arguing that because he was at the residence when the officers arrived and did not give his consent for them to enter, the officers' subsequent arrest of him was illegal. The alleged illegality of the search had two consequences, according to defendant. First, it tainted the subsequent search, making any evidence obtained in the course of the search the fruit of the poisonous tree. Second, but for that illegal arrest, he would have been present and would have objected to any request for a search, in which case he would have been in the same situation as the husband in Randolph. The court of appeals was not persuaded by his argument. It found that his arrest was legal, relying on the magistrate judge's factual findings that entry had been made into defendant's house without protest from defendant and that defendant had not directed the two officers to wait outside in the blizzard while he dressed. United States v. DiModica, 468 F.3d 495, 499 (7th Cir. 2006). Therefore, the seized items were not "fruit of the poisonous tree." Moreover, once defendant was legally off the premises, his case was like Matlock and not like Randolph and his consent was not necessary for a reasonable search of his residence.

Defendant filed for rehearing of his case but the court of appeals denied his request.

His next step was to file this motion for reconsideration.

OPINION

Defendant believes that because this court never made a definitive finding that the officers had his consent to enter his residence, it was error for the court of appeals to assume that such a finding had been made. He would like this court to take further evidence or direct the magistrate judge to reconsider the search in the light of Randolph. It is true that the court never made an explicit finding that the officers had defendant's consent before they entered his residence, but it is part of the record that the magistrate judge found that "Officer Grimyser . . . crossed the threshold into the mudroom without protest from DiModica" and that "DiModica did not direct Officer Grimyser (or Agent Smith) to wait outside on the stoop in the blizzard while he dressed," R & R, dkt. #27, at 4. It was these facts upon which the court of appeals relied.

Even if these findings were not part of the record and even if the court of appeals erred, defendant's remedy does not lie in this court. He could move for re-hearing, as he did, or he could have sought certiorari in the United States Supreme Court. He cannot ask this court to reconsider a case that has been decided by a higher court (unless of course the higher court had remanded the case for further proceedings in this court).

Once a defendant has taken a direct appeal of his conviction and has obtained a final

ruling from the court of appeals, his opportunities for additional review are strictly circumscribed. As a general matter, the only route open to a defendant in this situation is postconviction relief pursuant to 28 U.S.C. § 2255. However, defendant cannot use that route. He challenged the legality of his arrest and the subsequent search of his house in the court of appeals. The appellate determination is the law of the case, not open to re-examination. Section § 2255 proceedings do not provide an opportunity to re-argue issues that have been decided on direct appeal. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994) (section 2255 not intended to be either substitute for direct appeal or opportunity to re-argue matters decided on direct appeal; "law of the case" doctrine prevents re-argument).

Defendant has not suggested any basis on which this court could reconsider his case and I am aware of none. Therefore, his motion for reconsideration must be denied.

ORDER

IT IS ORDERED that defendant Nicholas P. DiModica's motion for reconsideration

is DENIED for lack of jurisdiction.

Entered this 6th day of February, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge