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

05-CR-0064-C-01

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Defendant Nicholas P. DiModica has filed objections to the United States Magistrate Judge's recommendation to deny defendant's motion to suppress evidence seized from his house during a search by the police pursuant to consent given by defendant's wife Anita. In a report and recommendation entered on August 5, 2005, the magistrate judge found that Anita's consent was sufficient to permit the police to search defendant's house, despite the officers' failure to ask defendant for his consent when they arrived to arrest him and undertake their search. In reaching this conclusion, the magistrate judge relied on United States v. Matlock, 415 U.S. 164 (1974), a case in which the Supreme Court held that any tenant who possesses common authority over a residence may give consent to a search and that it is not necessary for the police to obtain consent from an absent, nonconsenting co-

tenant.

Defendant objects to this finding, arguing that a better view of the law is that when two parties have joint control of property, one party cannot overrule the other's lack of consent to enter and search. He does not agree with the magistrate judge that Matlock is still good law or that it applies to a situation in which the person whose property the officers want to search is available to give or withhold his consent.

Despite defendant's criticism of Matlock, its holding remains the law in the federal courts and in the majority of state courts. Only a few courts have held to the contrary. E.g., State v. Randolph, 278 Ga. 614 (2004), cert. granted, 125 S. Ct. 1840 (2005), and State v. Leach, 113 Wash. 2d 735 (1989). In these two cases, the courts held that Matlock applies only when the non-consenting tenant is physically absent at the time that consent is sought. It is possible, but not likely that the United States Supreme Court will agree with the Georgia court that Matlock should be limited in this manner. Until and unless that happens, however, this court is bound by its holding.

Defendant tries to distinguish the circumstances of his case from those in Matlock, but his effort is unsuccessful. There are differences but they are immaterial. In both cases, the police officers arrested the defendant and removed him from the premises without asking him whether they could search his residence and obtained permission to search from the co-tenant. (In defendant's case, the permission came before the arrest; in Matlock, the

permission was obtained after the arrest.) It is true that Matlock was in his yard and defendant DiModica was inside his house, but either man could have been asked for his consent before he was removed from the scene. In upholding the search of the bedroom that Matlock shared with his co-tenant Gayle Graff, the Supreme Court reiterated its holding in Frazier v. Cupp, 394 U.S. 731, 740 (1969), that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." Matlock, 415 U.S. at 170.

Defendant argues that the magistrate judge erred in ignoring the issue of the police officers' use of a pretext to enter defendant's house and arrest him. The magistrate judge thought the issue immaterial because the arrest did not produce any evidence that the government intends to introduce at trial. Defendant takes issue with this conclusion, noting that without the arrest, defendant would have remained in the house and thwarted the search effort. This makes the search and the evidence it uncovered the fruit of the poisonous tree in defendant's view. He adds that the evidence showed that defendant directed the officer to wait outside while he finished dressing and that the magistrate judge erred in finding otherwise because it is inherently incredible to think that officers who suspected defendant of being armed and dangerous would have allowed him to retreat into another part of his house to find a shirt.

Even if the magistrate judge did err in finding that defendant allowed the officers to

come into his house before they proceeded to arrest him, Anita's consent would have allowed them to enter. Consent or exigent circumstances will permit entry into a residence to make an arrest, in the absence of a valid warrant. Sparing v. Village of Olympia Fields, 266 F.3d 684, 688 (7th Cir. 2001).

ORDER

IT IS ORDERED that the August 5, 2005 report of the United States Magistrate Judge is ADOPTED. FURTHER, IT IS ORDERED that defendant Nicholas P. DiModica's motion to suppress evidence seized from him in a search of his residence on the night of March 17-18, 2005, is DENIED.

Entered this 17th day of August, 2005.

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