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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

05-CR-064-C

NICHOLAS P. DIMODICA,

Defendant.

REPORT

Before the court for report and recommendation is defendant Nicholas DiModica's motion to suppress evidence seized from his house during a police search. *See* dkt. 18. DiModica contends that the police entered his in violation of *Payton v. New York*, 445 U.S. 573 (1980), and that his presence on the scene nullified the consent to search the residence previously provided by his wife, Anita. *See State v. Randolph*, 278 Ga. 614 (2004), *cert. granted*, ___U.S. ___, 125 S.Ct. 1840 (2005). I find that Anita DiModica's consent remained valid and that the *Payton* issue does not affect the outcome. Accordingly, I am recommending that the court deny DiModica's motion.

On June 27, 2005, this court held an evidentiary hearing. Having heard and seen the witnesses testify, having made credibility determinations, and having reviewed all the exhibits offered by both parties, I find the following facts:

FACTS

Anita DiModica was one of those people enthralled by the breathless media coverage of Scott Peterson's trial for murdering his wife, Lacy. Indeed, Anita[1] divined eery parallels between her marriage and the Petersons' on the cusp of Lacy's murder. Having convinced herself that she was in imminent danger, Anita reached out to law enforcement officials who already were investigating her husband.

On March 17, 2005, Anita telephoned Special Agent Jay Smith, who investigated drug crimes for Wisconsin DOJ's DCI. She arranged to meet Agent Smith at about 6:00 p.m. that night away from her house and DiModica. Anita and Agent Smith talked for about ninety minutes. Among other things, Anita expressed fear of her husband; she confirmed that she lived with him at 1640 Highways 12 & 18 and that she had joint access to all parts of the house; and she alleged that DiModica was a drug user, it was likely he had drugs and drug paraphernalia in the house, and that DiModica possessed several firearms even though he was a convicted felon. Anita also alleged that she had suffered domestic abuse at DiModica's hands within the past month. Apparently, Anita also reported that DiModica currently was at home.

Recognizing a serendipitous investigative opportunity, Agent Smith convinced Anita to file a domestic abuse complaint against her husband that night so that local police could

[1]For clarity of reference, I will refer to Anita DiModica by her first name and Nicholas DiModica by his last name.

arrest him. Then Agent Smith and his colleagues would search the house for drugs and guns. Anita agreed. For jurisdictional reasons irrelevant to suppression, later that evening Officer Peter Grimyser of the Cottage Grove Police Department met with Anita and Agent Smith at the local precinct of the sheriff's department. Officer Grimyser interviewed Anita and determined that there was probable cause that DiModica had violated Wisconsin's domestic abuse laws, and that because the incident had occurred within the past twenty-eight days, DiModica was subject to mandatory arrest. Officer Grimyser agreed to accompany Agent Smith to the DiModica residence that night and to arrest DiModica. No one sought an arrest warrant or a search warrant.

To implement the primary objective of his plan, Agent Smith next obtained from Anita written consent to search the DiModicas' home. As stated in the form she signed, Anita permitted the agents "to search every part of the premises under my control . . . and to take any drugs, illegal firearms, other contraband found there." Anita drew a house map, marked DiModica's bedroom, provided a key to the front door and instructed the agents how to enter if DiModica did not answer the door.

Leaving Anita behind, Agent Smith and Officer Grimyser drove to the DiModica residence in a marked squad car. It was near 11:00 p.m. and a blizzard raged. Because the agents expected that DiModica would be home and might be armed, they decided to lie to him in order to enter the residence safely: they would tell him that Anita had been injured badly in an automobile accident; they assumed this would cause DiModica to usher them inside, where they could arrest him before he could grab a gun or otherwise resist.

What happened next is disputed; having heard and seen all three participants testify, it is difficult for me to determine which version of events is more accurate because neither account is completely logical. Perhaps this portion of the narrative is irrelevant given my consent analysis under *United States v. Matlock*, 415 U.S. 164 (1974), but in the interest of completeness, I will find facts to fill the gap:

The agents parked in the driveway of the DiModica residence. Probably both of them went to the door, but Agent Smith might have remained in the car. Officer Grimyser knocked and DiModica answered, wearing pants but no shirt. Officer Grimyser told DiModica that Anita had been badly hurt in a car accident, eliciting surprise and concern from DiModica. Officer Grimyser–and perhaps Agent Smith–then crossed the threshold into the mudroom without protest from DiModica. DiModica excused himself to put on a sweatshirt. DiModica did not direct Officer Grimyser (or Agent Smith) to wait outside on the stoop in the blizzard while he dressed.

When DiModica returned to the mud room, Officer Grimyser arrested him, handcuffed him and removed him from the scene. The agents then admitted to DiModica that they had conned him and that Anita was unharmed.

No one ever asked DiModica for consent to search the home. DiModica never told the agents that they could not search. The agents began their search after removing DiModica from the scene. Anita met the agents at her house and actively assisted the search.

ANALYSIS

DiModica argues that the evidence seized from his home must be suppressed because the police entered his home without his consent. DiModica invokes *Payton v. New York*, which forbids police from making a warrantless and nonconsensual entry into a suspect's home in order to make a non-exigent felony arrest. 445 U.S. at 576. DiModica then attempts to distinguish *United States v. Matlock*, which holds that when a defendant and a third party both exercise actual authority over joint property, the defendant has assumed the risk that the other person might permit access to police. 415 U.S. at 171, n. 7; see also *United States v. Basinski*, 226 F. 3d 829, 834 (7th Cir. 2000). DiModica contends that *Matlock* does not cover the situation where two people both have authority over property and one consents to the search but the other, who is present on the property, does not.

There is some support for DiModica's second proposition. Although most courts–including the Seventh Circuit–have held otherwise, a smattering of courts have limited the application of *Matlock* to situations where the non-consentor is physically absent at the time of the search. These courts hold that even if police obtain consent to search from one resident, they nonetheless are barred from searching if another resident with equal authority over the property is present and refuses to consent. *See, e.g.*, *State v. Randolph*, 278 Ga. at 615; *State v. Leach*, 113 Wash. 2d 735, 744, 782 P. 2d 1035, 1040 (1989).

We can dispose of the *Payton* issue as a canard: no evidence that the government intends to introduce at trial was obtained as a result of DiModica's arrest. Therefore, even

if the police illegally entered the home to arrest DiModica, suppression of evidence obtained during the subsequent search permitted by Anita should not be suppressed. S*ee, e.g., United States v. Blackwell*, ___ F.3d ___, 2005 WL 1743800 (July 26, 2005, 7th Cir.)("When a violation of the fourth amendment occurs but is not essential to the causal sequence, the remedy is damages (for invasion of privacy) rather than immunity for one's crimes.") Therefore, the ostensible *Payton* issue melds into the *Matlock* issue: either the agents were authorized to enter and search the residence pursuant to Anita's consent or they were not.[2]

When the dispute is framed this way, DiModica's argument becomes more tenuous because he never specifically denied the agents permission to search. DiModica is left to argue that his purported refusal to let the agents cross his home's threshold while he went to get a sweatshirt should be deemed a complete and inviolable bar to any subsequent police entry for any purpose, even purposes of which he was unaware (but to which Anita previously had consented). This is a tortuous argument that is obviated by the facts found above. But this court still must analyze the consent issue because DiModica did not have an opportunity explicitly to refuse consent to search: the agents never asked him and they removed him before they began searching. At least one court–the Washington Supreme

[2] If Anita's consent to enter the home for a search was valid, then this consent would appear to justify entry to arrest. *See e.g. Sparing v. Village of Olympia Fields*, 266 F.3d 684, 688 (7th Cir. 2001) ("police officers may not constitutionally enter a home without a warrant to effectuate an arrest, absent consent or exigent circumstances, even if they have probable cause"); see also *Illinois v. Rodriguez*, 497 U.S. 177 (1990)(defendant's girlfriend had apparent authority to authorize police to enter defendant's apartment for the purpose of arresting him).

Court–imposes upon police a duty to seek consent to search from occupants who are present, and the U.S. Supreme Court has granted *certiorari* to consider a similar case from Georgia.

In the Georgia case (*State v. Randolph*, 278 Ga. 614) the facts presented the consent dispute more squarely: the police asked the defendant for consent to search his home and he refused; the police then turned to his wife, who granted permission. The court held that the wife's consent was not valid "in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." 278 Ga. at 614. Here, obviously, DiModica did not actually refuse consent to search because he never had the opportunity and he already was gone by the time the search began.[3] It is unclear whether the court in *Randolph* would apply their holding to facts like these.

More favorable to DiModica is *State v. Leach* in which the Washington Supreme Court held that consent to search remains valid against a co-habitant with equal control only when the co-habitant is absent; if the co-habitant is present and able to object, then the police first must obtain his consent before searching. 113 Wash. 2d at 744.[4]

Such approaches is appealing and logical, but it is not currently federal law. Perhaps the United States Supreme Court granted *certiorari* in *Randolph* to consider whether to limit *Matlock*; more likely, the Court intends to clarify that *Matlock* controls. After all, the facts

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[3] DiModica did claim at the evidentiary hearing that he specifically directed Officer Grimyser to wait outside on the stoop while DiModica finished dressing but I have declined to accept this testimony. In any event any such direction would have been temporally distinct from the search that began after DiModica was on his way to jail.

[4] *Leach* and *Randolph* both were split decisions (5-4, 4-3), with written dissents.

in *Matlock* were not so different from the *Leach* or *Randolph* cases, yet the Court found that third party consent was valid. Police arrested Matlock in the front yard of the residence in Pardeeville at which he was a boarder. After arresting Matlock, officers took him to wait in a squad car some distance from the home. The arresting officers did not ask Matlock which room he occupied and did not ask him whether he would consent to a search. The police then asked one of the other residents, a Mrs. Graff, for consent to search, which she granted. The search included a bedroom which Mrs. Graff reported she occupied jointly with Matlock. In the bedroom closet officers found money from a bank robbery which they then admitted at trial against Matlock. 415 U.S. at 166, 179.

So, to the extent that Matlock was "absent" from the premises when police obtained Mrs. Graff's permission to search, he was absent because the police had removed him in handcuffs without first asking for *his* consent. This tactic did not seem to concern the Court. I see no material factual distinction between DiModica's situation and Matlock's: the agents arrested DiModica, removed him from the scene, did not ask him for permission to search, but relied instead on the permission from and assistance of Anita, who actively participated in the search after police removed DiModica.

Also instructive is *United States v. Field*, 371 F.3d 910 (7th Cir. 2004), in which the court expressed skepticism about how police purportedly gained entry to defendant's apartment, but did *not* express concern over their failure to ask the defendant for permission to search his apartment after they arrested him and while they detained him outside. If the officers had validly entered defendant's apartment and then obtained consent to search from

a woman therein who identified herself as defendant's wife, then apparently the court of appeals would uphold this warrantless search, even though the police never sought or obtained defendant's consent to search. *Id* at 912-13, and 914 ("the Fourth Amendment's prohibition on warrantless entry into a person's home does not apply, however, when voluntary consent to enter is obtained either from the person whose property is searched, or from someone, such as a spouse, with actual or apparent authority over the premises.")

It follows from these cases that it could not have been unreasonable for Agent Smith and Officer Grimyser to proceed as they did. In *Illinois v. Rodriguez* the Court noted that the Fourth Amendment protects people from "unreasonable" searches and that one thing that makes the search of a person's house "reasonable" is "the consent of the person *or his co-tenant*." 497 U.S. at 183-84, emphasis added. Indeed, the court in *Rodriguez* held that *apparent* authority to consent to entry is enough because

> The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to the entry is a resident of the premises, then it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.

Id. at 186.

How then could it have been unreasonable for Agent Smith and Officer Grimyser to proceed on the basis of Anita's consent alone, when that is the clear import of existing Supreme Court and Seventh Circuit law?

DiModica is asking for the evolution and refinement of existing law, to which perhaps he may someday be entitled; however, pursuant to cases such as *Matlock*, *Rodriguez* and *Fields*, federal law does not now prohibit home searches unsupported by consent to search from every person present who has authority over the residence. It is not even clear what would qualify as "present" if such a rule were to be adopted. Suppressing evidence in the instant case would punish police for acting in good faith reliance on consent law as it is generally understood not just by police but also by most courts. *Cf. United States v. Rodriguez*, 888 F.2d 519, 523 (7th Cir. 1989)(suppressing evidence because of what the police did not then know would inject a random element into Fourth Amendment jurisprudence without serving any of the functions of the exclusionary rule).

Perhaps DiModica is correct that it is time to tighten up the rules on third party consent searches, and perhaps the Supreme Court will do this in *State v. Randolph.* But as the above-cited cases illustrate, this *would* be a new rule: both the Supreme Court and the Seventh Circuit now allow searches based on third party consent and they do not require officers also to seek and obtain consent from defendants who are at or near the scene. Therefore, DiModica is not entitled to the relief he seeks.

RECOMMENDATION

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

Entered this 5th day of August, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

August 5, 2005

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Re: United States v. Nicholas P. Di Modica
Case No. 05-CR-064-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before August 15, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 15, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge