

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORDER

YOU BIN YANG and
YOU LIN YANG,

05-CR-186-S-02
05-CR-186-S-03

Defendants.

Defendants You Bin Yang and You Lin Yang were charged with tax crimes arising from their alleged failure to declare the cash receipts from a restaurant they owned and operated in Eau Claire, Wisconsin. On May 2, 2006 defendants pled guilty to Counts 1 and 11 of the indictment pursuant to written plea agreements. They move to suppress the evidence derived from police inspection of notebooks taken from You Bin Yang's home after he was a burglary victim.

On June 2, 2006 the Honorable Stephen L. Crocker, United States Magistrate Judge, recommended that defendants' motion to suppress evidence be denied.

On June 16, 2006 defendants filed objections to the report and recommendation. Specifically, they object to the Magistrate Judge's finding that they did not have an expectation of privacy in the contents of the notebooks. Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court reviews the report and recommendation and finds as follows.

FACTS

On October 30, 2002 the defendant You Bin Yang (defendant) called the Eau Claire Police Department to report a burglary at his home on 415 West Tyler Street. At around 4:30 p.m. Officer Dave Kleinhaus went to the scene and spoke with the defendant who allowed him to view the crime scene. Officer Brian Schneider arrived to gather evidence. He bagged as evidence five notebooks that he found either in the dresser or lying in front in the defendant's parents' bedroom from which cash had been taken.

Three of the notebooks were spiral bound and two were book bound. The notebooks bore no marks on their covers indicating their contents except the numbers 2002, 2001 and 2000 had been written on the covers of three notebooks. None of the notebooks were sealed in any fashion. Officer Schneider asked the defendant whether he could take them to the police department to process them for fingerprints. Defendant did not object.

On November 1, 2002 the defendant called the police department and spoke with Sergeant Larsen and advised him that he needed the notebooks returned. Larsen told the defendant that the notebooks should be available on November 4. Yang asked if they could be available earlier because there was one particular notebook he needed. Larsen said he would check.

Prior to the burglary Sergeant Larsen knew that the IRS was investigating the defendant. He obtained the notebooks from the burglary evidence and opened them. Because he saw that they

contained writing in Chinese and appeared to be financial records for the restaurant that might be useful to the IRS investigation, he began photocopying the 2002 notebook.

While Sergeant Larsen was photocopying, evidence technician Detective Todd Trapp advised Sergeant Larson that most of the fingerprint processing would be done on the outside of the books but that if any fingerprint powder touched the pages it would make the writing difficult to read. Larsen then advised the defendant that the officers could copy the books to make sure the writing was preserved during the fingerprinting process but that Yang could come and get the books he needed. Yang took the 2002 notebook later that day and told the police they could photocopy the notebooks before processing them for fingerprints.

Sergeant Larson informed Steven Makowski, a special agent with the Internal Revenue Service's Criminal Investigation Division, that the Eau Claire Police had notebooks from the defendant's residence as part of a burglary investigation. Agent Makowski obtained a grand jury subpoena for copies of the notebooks and served it on Detective Trapp on November 4, 2002. Agent Makowski photocopied the notebooks at the police station, had them translated into English and used them in defendant's criminal prosecution.

MEMORANDUM

Defendants object to the Magistrate Judge's finding that the defendants had no expectation of privacy in the contents of the notebooks. They argue that Sergeant Larsen exceeded the scope of

defendant's consent to seize the notebooks when he opened them to inspect their contents. The government contends that opening the notebooks was not a search because the defendants lacked a reasonable expectation of privacy in the contents of the notebooks.

A defendant has a reasonable expectation of privacy in an object when (1) the complainant exhibits an actual (subjective) expression of privacy in the searched object and (2) the individual's expectation, viewed objectively, is one that society is prepared to recognize as "reasonable." Kyllo v. United States, 533 U.S. 27, 33 (2001). A defendant objecting to a search bears the burden of an actual expectation of privacy in the searched object. United States v. Ruth, 65 F. 3d 599, 604 (7th Cir. 1995).

Defendant may have had a subjective expectation that the inside of the notebooks would remain private while at the police station. This subjective expectation, however, was not objectively reasonable. A reasonable person would have thought that a well-trained police officer would likely look through the contents of the notebooks for clues and to prevent the loss of any receipts, credit cards, cash or loose papers that might be between the pages. This procedure is both prudent and logical. Further, because the notebooks were not fastened or sealed in any way they could open accidentally exposing a few pages to plain view.

A reasonable person would realize that the contents of the unsealed notebooks would be viewed by police officers. Accordingly,

the defendants did not have a reasonable expectation of privacy in the contents of the notebooks.

Since the defendants did not have a reasonable expectation in the privacy of the contents of the notebooks, the opening of the notebooks was not a search and did not violate the Fourth Amendment. Because no search occurred, the Court need not address whether the defendants consented to the search. The Court adopts the Magistrate Judge's recommendation that the motion to suppress the evidence should be denied.

ORDER

IT IS ORDERED that the recommendation of the Magistrate Judge to deny defendants' motion to suppress evidence is ADOPTED.

IT IS FURTHER ORDERED that defendants' motion to suppress evidence is DENIED.

Entered this 19th day of June, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge