

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

JACOB FALKNER,

06-CR-112-S

Defendant.

REPORT

Before the court for Report and Recommendation are defendant Jacob Falkner's motion to suppress post-arrest statements (dkt. 14) and motion to suppress physical evidence (dkt. 15). Because the government will not be using the challenged statements in its case in chief, the parties did not brief the issue and the court may deny the motion as moot. The parties *do* contest whether physical evidence should be suppressed. Falkner claims that police detectives unlawfully exceeded the scope of consent to enter provided by Falkner's brother Shaun during his interview with the detectives, and that they overstated their evidence to the state court when obtaining a search warrant.

On June 22, 2006, this court held an evidentiary hearing on this motion to suppress. Having heard and seen the witnesses testify and having considered the relevant documents, I find the following facts:

FACTS

In November 2004, the Fitchburg Police Department was investigating the disappearance of a man named Amos Mortier. Because Mortier was believed to be part of the drug-trafficking milieu, the Fitchburg police asked the Dane County Sheriff's Department to assign Detective David Bongiovani, a drug investigator, to assist with the investigation.

Police had a list of possible witnesses to interview about Mortier, including Jacob Falkner and his brother Shaun. On November 20, 2006, Detective Bongiovani and Fitchburg Police Detective Shannan Morgan visited the Falkner's residence at 2450 Lalor Lane in the Town of Dunn. The detectives knocked on the door at approximately 1:30 p.m.; Shaun answered wearing only underwear, explaining that he had just arisen. The detectives asked if they could come in to speak to him about Mortier. Shaun initially balked and asked if he could talk to the detectives right there in the doorway. The detectives replied that it was cold outside; They asked to come in out of the cold and to sit down to take proper notes. Shaun responded affirmatively and allowed the detectives in. Shaun padded down the hall with the detectives in tow.

Upon entering the residence each detective immediately noted and recognized the pungent aroma of growing marijuana. They said nothing, however, and Shaun left them at the threshold of the living room while he repaired to a bedroom to pull on some pants. Shaun returned to the hall and directed the detectives into the living room which was

furnished with two couches and a coffee table. The detectives observed loose marijuana scattered on the coffee table and the floor, perhaps enough to roll a joint.

Both couches were filthy and one had a hole chewed into the cushion. Nonetheless, Detective Morgan perched on one and Shaun sat on the other. Deeming the couches an unpalatable seating option, from where he stood in the living room Detective Bongiovani could see chairs in the dining room beyond a partial dividing wall. Detective Bongiovani asked Shaun if he could retrieve a chair from the dining room. Shaun neither agreed nor disagreed, providing no verbal or physical signal that he disapproved.

Detective Bongiovani walked about 15 feet into the dining room and retrieved a chair. In the dining room Detective Bongiovani saw a bowl containing marijuana and a Mason jar containing marijuana buds. This contraband was not visible from the living room. Detective Bongiovani said nothing, but simply returned to the living room with his chair. Both detectives then questioned Shaun for about an hour regarding Mortier's disappearance.

Upon concluding the Mortier interview, the detectives asked Shaun if there was a marijuana grow in the residence. Shaun responded "Possibly" or "it's possible." The detectives asked permission to search the house; Shaun declined. The detectives announced that they were securing the premises until they could obtain a search warrant. Detective Bongiovani stayed with Shaun in the residence while Detective Shannan sought and obtained the warrant, the execution of which uncovered evidence that is being used against defendant Jacob Falkner in the instant prosecution.

ANALYSIS

I. Suppressing Falkner's Statements

The government has agreed that it will not use Falkner's statements in its case in chief, but Falkner, in an abundance of caution, would like a court ruling to this effect. I recommend that the court provide the requested ruling.

II. Scope of Shaun Falkner's Consent To Enter

Consent to search is an established exception to the Fourth Amendment's warrant requirement, and any person with common authority over the premises, in the absence of contemporaneous objection by a co-occupant, may allow police to enter and move about the premises. *See Georgia v. Randolph*, ___ U.S. ___, 126 S.Ct. 1515, 1520 (2006). Police must honor any limits placed on the consent provided. *United States v. Breit*, 429 F.3d 725 (7th Cir. 2005). When the parties dispute the scope of the consent provided and whether police honored its limits, courts are to consider the totality of the circumstances and ask what the typical reasonable person would have understood by the exchange between the officer and the consentor. *Id.*; *see also United States v. Long*, 425 F.3d 482, 486 (7th Cir. 2005)(same).

In this case, the person who actually provided the consent, Shaun Falkner, has not testified or provided an affidavit. Jacob Falkner is left to argue that it would have been apparent to Detective Bongiovani that by announcing his intention to retrieve a chair from the dining room and then doing so in the absence of any veto from Shaun, he was exceeding

Shaun's previously-granted permission to enter the residence and talk with the detectives in the living room. In his reply brief, Falkner speculates that perhaps Shaun didn't even *hear* Detective Bongiovani. To state these arguments is to refute them.

After half-heartedly suggesting an interview on the porch, Shaun allowed the agents into the house with no express or implied limitations. He left them alone in the hallway while he dressed, an act that reasonably could be viewed as indifference to whether the detectives looked about while he was absent. In the living room, Detective Bongiovani had legitimate reasons for seeking something to sit on other than the indisputably nasty couch. He asked to retrieve a chair visible to him from the dining room, and Shaun did not object in any fashion. Is there anyone in America who has *not* handled overflow seating in the living room by bringing in the dining room chairs? In the absence of objection from Shaun, it was eminently reasonable for Detective Bongiovani to walk about six steps into the adjoining dining room to retrieve a clean chair that was visible to him whence he stood. Even if Shaun hadn't heard what Detective Bongiovani said, he saw him walking toward the dining room but said and did nothing to stop him. The only rational conclusion to draw from this set of circumstances is that Shaun had no objection to Detective Bongiovani venturing into the dining room. *See, e.g., United States v. Wesela*, 223 F.3d 656, 661 (7th Cir. 2000)(consent to search may be implied from failure to object to police conduct). The police visited no mayhem upon cherished constitutional precepts of privacy by grabbing a chair from the next room. This portion of Falkner's motion to suppress should be denied.

III. Probable Cause for the Search Warrant

Falkner realizes that unless the court redacts Detective Morgan's search warrant affidavit to exclude Detective Bongiovani's observations, he cannot prevail on his probable cause challenge. Since there is no reason to suppress Detective Bongiovani's observations, there is no reason to quash the warrant.¹

The police would have had probable cause to support the warrant even in the absence of Detective Bongiovani's observations in the dining room. Probable cause exists when the circumstances, considered in their totality, induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *United States v. Mykytiuk*, 402 F.3d 773, 776 (7th Cir. 2005). Probable cause is a fluid concept that relies on the common-sense judgment of the officers based on the totality of circumstances known to them. In determining whether suspicious circumstances rise to the level of probable cause, officers are entitled to draw reasonable inferences based on their training and experience. *United States v. Reed*, 443 F.3d 600, 603 (7th Cir. 2006). "So long as the totality of the circumstances, viewed in a common sense manner, reveals a probability or substantial chance of criminal activity on the suspect's part, probable cause exists." *United States v. Parra*, 402 F.3d 752, 763-64 (7th Cir. 2005). It is not appropriate to consider each piece of evidence individually in a "divide and

¹ For what it's worth, the parties have agreed to edit the affidavit to reflect that Shaun Falkner, when asked if marijuana was being grown in the residence, responded "It's possible," not that it was "likely." This does not change the outcome.

conquer” approach; rather the focus must be on what the evidence shows as a whole. *United States v. Caldwell*, 423 F.3d 754, 760 (7th Cir. 2005).

To uphold a challenged warrant, a reviewing court must find that the affidavit provided the issuing court with a substantial basis for determining the existence of probable cause. In the Seventh Circuit, this standard is interpreted to require review for clear error by the issuing court. Reviewing courts are not to invalidate a warrant by interpreting the affidavits in a hypertechnical rather than a common sense manner. *Id.*

Put another way, a court’s determination of probable cause should be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the court reasonably could conclude that the items sought to be seized are associated with the crime and located in the place indicated. Doubtful cases should be resolved in favor of upholding the warrant. *United States v. Quintanilla*, 218 F.3d 674, 677 (7th Cir. 2000).

Under this standard, even the highly redacted search warrant affidavit would pass muster. The Court of Appeals for the Seventh Circuit has held that the smell of burning marijuana emanating from a car provided probable cause to search it. *United States v. Wimbush*, 337 F.3d 947, 951 (7th Cir. 2003). Other courts have found that the aroma of growing marijuana can provide probable cause to search. *See, e.g., United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998); *United States v. Charles*, 29 Fed. Appx. 892, 2002 WL

369803 at **5-6 (3rd Cir. 2002). Here, Detective Morgan averred that she smelled “the odor of marijuana in plant form” upon entering the house, saw marijuana on the coffee table and living room floor, and heard Shaun admit that it was possible that marijuana was being grown in the house. To have a resident admit even the possibility of a grow operation, coupled with the smell of growing marijuana, was enough to support the search warrant.

Add to the mix Detective Bongiovani’s observation of the bowl of marijuana and jar of buds in the dining room and the warrant is unassailable. There is no basis to grant Falkner’s motion to quash.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend this court grant defendant’s motion to suppress his statements as a formality and that it deny in all respects defendant’s motion to suppress physical evidence.

Entered this 14th day of July, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

July 14, 2006

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Re: ___ United States v. Jacob Falkner
Case No. 06-CR-112-S

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 July 24, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 24, 2006, 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 John C. Shabaz, District Judge