

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORDER

RICHARD RYERSON,

06-CR-172-S-01

Defendant.

The Court will vacate its January 4, 2007 order adopting the report and recommendation without objection because defendant's counsel has advised the Court that he filed the objections on December 27, 2006. The objections were inadvertently overlooked. The Court will now address defendant's objections to the Magistrate Judge's report and recommendation.

Defendant Richard Ryerson moved to suppress evidence seized in a search of his residence. The government opposed this motion. On November 9, 2006 the Honorable Stephen L. Crocker, United States Magistrate Judge, held an evidentiary hearing on defendant's motion. On December 22, 2006 the Magistrate Judge recommended that defendant's motion to suppress evidence be denied.

Pursuant to 28 U.S.C. § 636(b)(1)c, the Court reviews the defendant's objections to the Magistrate Judge's report and recommendation and finds as follows.

Facts

On Wednesday, February 8, 2006, Jennifer Lawicki met with Sergeant Wehinger at the Adams County Sheriff's Department. She advised on a police form that her current address was 918 Gale Drive, Wisconsin Dells but told Sergeant Wehinger that she lived with defendant Ryerson in a residence he owned at 911 Gillette Lane, Wisconsin Dells. At this point Ryerson was detained in the Adams County Jail on a probation hold.

Lawicki reported that after she had left the Gillette Drive residence on Saturday, February 5, 2006, Ryerson had changed the locks. Sergeant Wehinger advised Lawicki that as long as she was a resident of the house she could break a window or force a door to enter.

On February 9, 2006 Lawicki returned to the Sheriff's department with David Curley with whom she was staying at 918 Gale Drive. They met with Investigator Mark Bitsky and Investigator Todd Laudert. Lawicki advised Bitsky that she was not in a romantic relationship with Curley and that she had broken a window at the Gillette Lane residence to obtain some of her belongings the night before. She stated several times that she lived with Ryerson and their baby at 911 Gillette Lane and that her belongings were at the residence. She also stated that she had gone to Chicago earlier that week on February 5, 2006 and had not planned to return but returned to handle child custody issues with the defendant.

Lawicki told Bitsky that Ryerson had sold drugs from the Gillette residence when he stored weapons including a Thompson submachine gun. She also reported that on February 5, 2006 there had been a bag of marijuana on the kitchen table and a digital scale in the cupboard. She further advised that the last time she had seen the machine gun was three months ago. She recalled hearing Ryerson tell someone that maybe they should hide the gun behind the new drywall in the garage but she didn't think they actually did that.

Became of this discussion Inspector Bitsky asked Lawicki if she would consent to a search of the residence for contraband. Lawicki agreed to the search and signed a written permission to search form for 911 Gillette Lane at 3:16 p.m. on February 9, 2006.

Around 6:00 p.m. on February 9, 2006 Inspector Bitsky and other officers arrived at 911 Gillette Lane. Lawicki and Curley were also present. They contacted Jason Krumscheid, an employee of defendant's taxi cab company, to obtain a key. Krumscheid arrived and did not hesitate to open the door to the residence with a key and did not question the authority of the officers to search the residence.

During the search Lawicki told DCI Agent Smith that she and the defendant had purchased the property at 911 Gillette Lane but that he insisted that the house be in his name alone. She reported that they resided there as a couple along with their infant

daughter Melissa. She advised that they had previously lived together at 918 Gale Drive but that David Curley had purchased that residence from them. Agent Smith observed items belonging to a man, woman and an infant in the residence being searched.

Inspector Laudert interviewed Jason Krumscheid at about 9:00 p.m. at the 911 Gillette Lane residence. Krumscheid stated that Dave Curley was Jennifer Lawicki's new boyfriend. He also stated that he had bought marijuana from Ryerson two weeks ago, that he had removed the handguns from the house and placed them in the trunk of a Saturn car that was in the yard at 911 Gillette Lane.

During the search the officers found a pellet gun, ammunition, a digital scale with a white powdery residue on it and a pack of rolling papers. They did not find a machine gun or any drugs. The search ended around 9:30 p.m.

Around 6:04 the same evening Ryerson had telephoned Krumscheid from the jail and advised him that there was "a little rapid fire BB gun" hidden in the drywall in the garage at 911 Gillette. Ryerson told Krumscheid to get rid of the gun. This conversation took place prior to Krumscheid opening the door with the key prior to the search of 911 Gillette Lane.

Around 8:39 p.m. Ryerson told the jailers at the Adams County Jail he had a heart condition. Sergeant Mickelson met with him and determined he was agitated but not in cardiac distress. Ryerson expressed concern that Lawicki would be planting evidence at the

911 Gillette residence. After Ryerson was placed in his cell he handed a note addressed to the Sergeant about his concerns that his girlfriend would plant evidence. In the note he states that Jennifer Lawicki was his ex-wife but that she lived with him in the residence as his girlfriend.

When Bitsky returned to the sheriff's department after the search, the jailer handed him defendant's note. He did not actually read it until late the next day February 10, 2006 after the second search.

About 7:30 a.m. Bitsky listened to the tape recording of the call from Ryerson to Krumscheid the previous evening. He then called Lawicki and asked her to meet him at 911 Gillette Lane. He advised her that he thought the officers had missed a firearm the night before and asked for her permission to search again. Bitsky believed that Lawicki had authority to consent to the search because she continued to insist that she lived there and her property had been in the residence the night before.

At 8:49 a.m. Lawicki signed a second permission to search form. Investigator Laudert forced open the door to the garage. The investigators used a thermal imager to search for "dead spots" in the wall and Lawicki did not object. They found two dead spots and opened them. In the second one they found a Thompson submachine gun. They knew where to look based on Ryerson's telephone call to Krumscheid.

MEMORANDUM

The Magistrate Judge found that the police officers reasonably believed that Jennifer Lawicki had authority as a co-occupant of the residence at 911 Gillette Lane to consent to the two searches of the residence on February 9 and 10, 2006 according to United States v. Goins, 437 F. 3d 644, 649 (7th Cir. 2006). Defendant objects to the Magistrate Judge's conclusion and his failure to discuss the recent case, United States v. Groves, 470 F.3d 311, 321(7th Cir, 2006).

The Court held in Groves that a co-occupant could consent to the search of shared premises when the other occupant was not physically present to object as long as there was no evidence that the police had removed the potentially objecting tenant from the premises for the sake of avoiding a possible objection. There is no evidence in this case that Ryerson was removed from the residence for the sake of avoiding a possible objection. Defendant Ryerson was in the Adams County Jail on a probation hold for his conduct.

In Groves, the Court provided a discussion of whether a person had apparent authority to consent to the search of the residence as follows:

Facts that militate in favor of a finding of actual or apparent authority include but are not limited to: (1) possession of a key to the premises; (2) a person's admission that she lives at the residence in question; (3) possession of a driver's license listing the

residence as the driver's legal address; (4) receiving bills and mail at the residence; (5) keeping clothing at the residence; (6) having one's children reside at the residence; (7) Keeping personal belongings such as a diary or pet at that residence; (8) performing household chores at the home; (9) being on the lease for the premises and/or paying rent and (10) being allowed into the home when the owner is not present.

Id., at p. 319 (citations omitted).

The Court stated that for the apparent authority analysis it must consider that which the officers knew at the time they sought Lawicki's consent and whether those facts were sufficient to demonstrate that the officers reasonably believed that the person had shared authority as an occupant. Id.

At the time Lawicki gave her consent she had repeatedly told the police officers that she resided at 911 Gillette Lane. This fact was subsequently confirmed by Ryerson who stated she lived there as his girlfriend. Since defendant had recently changed the locks Lawicki did not have a key, but a key was voluntarily provided by Jason Krumscheid, defendant's employee. There is no evidence in the record concerning the address on Lawicki's driver's license or whether she received mail at 911 Gillette Lane.

Lawicki's child with defendant Ryerson resided at the residence. Lawicki kept her clothes and personal belongings at the residence. Agent Smith had seen the belongings of a man, woman and child on the night of February 9, 2206 which she could have reasonably believed belong to Ryerson, Lawicki and their child.

There is no evidence whether Lawicki performed household chores at the home but one could reasonably assume that she did since she lived there with her baby. She did not own or pay rent at the residence but lived there with defendant Ryerson as his girlfriend.

Based on these factors the Court finds that the officers could reasonably believe that Lawicki was a co-occupant of the residence at 911 Gillette Lane and could consent to a search of the residence to include the use of the thermal imager. The Court will adopt the Magistrate Judge's report and recommendation as modified herein and deny defendant's motion to suppress evidence.

ORDER

IT IS ORDERED that this Court's January 4, 2007 order is VACATED.

IT IS FURTHER ORDERED that the Magistrate Judge's recommendation is ADOPTED as modified herein.

IT IS FURTHER ORDERED that the defendant's motion to suppress evidence is DENIED.

Entered this 9th day of January, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge