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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD RYERSON,

Defendant.

REPORT AND RECOMMENDATION

06-CR-172-S

REPORT

Before the court for report and recommendation is defendant Richard Ryerson's motion to suppress evidence. *See* dkt. 6. Ryerson contends that local investigators violated his Fourth Amendment rights when they searched his residence based on the consent of Jennifer Lawicki, who Ryerson contends did not have actual or apparent authority to provide such consent. Ryerson also contends that the investigators exceeded the scope of Lawicki's purported consent by using a thermal imager to locate the machine gun hidden behind the garage wall, and then breaking into the wall to seize the firearm. Finally, Ryerson contends that he had made clear to other agents in the sheriff's department that Lawicki had no authority to enter his property, and therefore, pursuant to *Georgia v. Randolph*, 126 S.Ct. 1515 (2006), police could not have relied on her consent even if it was valid.

For reasons stated below, I conclude that it was reasonable for the investigators to rely on Lawicki's consent to conduct the challenged searches, they did not exceed the scope of

that consent, and the searches were legal. Accordingly, I am recommending that this court deny Ryerson's motion.

On November 9, 2006, this court held an evidentiary hearing on Ryerson's motion. Having heard and seen the witnesses testify, and having considered all the exhibits and affidavits, I find the following facts:

FACTS

On Wednesday, February 8, 2006, a woman named Melissa Lawicki met with Sergeant Wehinger at the Adams County Sheriff's Department to file a missing person report for her infant daughter. Lawicki reported that her ex-husband, Richard Ryerson, had snatched the child from Lawicki the previous Sunday (February 5, 2006) in Illinois, where Lawicki had been visiting her mother. Lawicki wrote on a police form that her current address was 918 Gale Drive, Wisconsin Dells, but she told Sergeant Wehinger that she lived with Ryerson in a residence he owned at 911 Gillette Lane, Wisconsin Dells. Lawicki asked if she could go back to the residence to retrieve property belonging to her and her daughter. She reported that after she left the home on Sunday, Ryerson had changed the locks so that she could not get back into the house. Sergeant Wehinger told Lawicki that as long as she was a resident of the house, she could break a window or force a door to get in if she wanted.

Ryerson, who was on state probation in an unrelated matter, ended up detained in the Adams County Jail because of his unauthorized trip to Illinois to seize the child. (It is not clear in the record exactly when Ryerson was taken into custody). While Ryerson was

jailed, he asked an employee of his taxi cab company, Jason Krumscheid, to keep an eye on the house at 911 Gillette Lane. Thus, when Lawicki broke a window to enter the house and retrieve belongings on the evening of February 8, Krumscheid promptly filed a burglary report with the sheriff's department.

Based on Lawicki's conversation with Sergeant Wehinger, on February 9, 2006 someone from the sheriff's department asked Lawicki to stop by to verify that she had been the person who had entered the house. Lawicki returned to the sheriff's department on February 9, 2006 around 1:00 p.m. David Curley, with whom Lawicki currently was staying at 918 Gale Drive, accompanied her to her meeting with Investigator Mark Bitsky and another investigator. Investigator Bitsky already was familiar with Ryerson from previous professional contacts. In response to the investigators' inquiry Lawicki stated that she was not involved in a romantic relationship with Curley: "There's nuthin'. No . . ."

Lawicki admitted that she had broken a window to enter the house pursuant to Sergeant Wehinger's instructions from the previous day, gathered a carload full of her belongings and drove off with them. In response to direct questions posed several times during the interview, Lawicki unequivocally stated that she still lived at 911 Gillette. Lawicki explained that she and Ryerson had been married, got divorced, continued living together at 918 Gale Drive, had the baby, moved to 911 Gillette, and continued to live together. Lawicki reported that her belongings as well as the infant's still were at the residence on Gillette Lane. She indicated that when she had driven to Chicago earlier that

week, she had not intended to return, but had come back in order to deal with the legal proceedings surrounding her child's custody after Ryerson had snatched her.

Lawicki discussed other topics with Investigator Bitsky, including her version of the child abduction in Illinois. Lawicki also reported that she was a 15% owner of the Dells Cab Company, Ryerson's taxi cab business. According to Lawicki, she worked for the company by answering calls at the home on Gillette. Investigator Bitsky's interest perked up when Lawicki reported that Ryerson had sold drugs from their home on Gillette and that he stored weapons there, including a Thompson submachine gun. According to Lawicki, on Sunday, February 5, 2006, when she left to visit Illinois, there had been a bag of marijuana laying on the kitchen table and a digital scale in the cupboard. She reported that Ryerson had kept the machine gun in a bag attached to a rope under the deck attached to the house. Lawicki told Investigator Bitsky that the last time she had seen the machine gun was three months ago. She recalled hearing Ryerson telling someone that maybe they should hide the machine gun behind the new drywall in the garage but she didn't think they actually did that.

Intrigued by Lawicki's report of marijuana and a machine gun, Investigator Bitsky asked Lawicki if she would consent to a home search for this contraband. Lawicki agreed. Bitsky presented Lawicki with a written permission-to-search form for 911 Gillette Lane. Lawicki signed this form at 3:16 p.m. on February 9, 2006.

Investigator Bitsky gathered deputies to assist with the search and contacted the Wisconsin Department of Justice in Madison to arrange for an agent from the Division of Criminal Investigation to accompany the deputies during the search. Meanwhile, Lawicki

attended a court hearing to obtain a temporary restraining order against Ryerson. In a sworn petition to the court, Lawicki repeated her allegations of kidnaping, assault and additional malfeasance against Ryerson. The court issued the TRO.

Around 6:00 p.m. on February 9, 2006 Investigator Bitsky and his deputies arrived at 911 Gillette. DCI Agent Michelle Smith also showed up. Lawicki arrived with Curley. Since no one had a key, someone contacted Krumscheid, the taxi company employee, who arrived with a key to the residence. Krumscheid explained that Ryerson had left him in charge of the home and the taxi cab business while Ryerson was in jail. Krumscheid did not hesitate to open the door and he did not question the agents' authority to search. Lawicki insisted that she enter first because there was a vicious cat in the house that probably would attack somebody. Lawicki was right: the cat was there and it went after the deputies, so Lawicki locked him up. Lawicki ushered the deputies into the residence.

The search began in the garage, where Lawicki pointed out a large safe and other areas of investigative interest and provided details about cash and contraband that Ryerson allegedly stored there. Unaware that the deputies already had obtained written consent for this search, Agent Smith ushered Lawicki into the kitchen to review DCI's written consent form with her. Lawicki signed this form at approximately 7:17 p.m.

Lawicki told Agent Smith the same story she had told Investigator Bitsky: that in 2005 she and Mr. Ryerson had purchased the property at 911 Gillette Lane. Ryerson had insisted that the house be placed in his name alone. They resided there together as a couple

along with their daughter. Lawicki explained that she and Ryerson previously had lived together at 918 Gale Drive in a home placed in Ryerson's name. They sold this residence to David Curley when they purchased the home on Gillette Lane. At Agent Smith's request, Lawicki retrieved business records of the cab company from another room in the house and reviewed them with Agent Smith. Lawicki also explained the pedigree of the Thompson submachine gun, which she last had seen in a red bag under the deck attached to the rear of the house about two months previously.

Agent Smith asked Lawicki to point out other areas where Ryerson had kept contraband. Lawicki pointed to a kitchen cabinet in which she claimed Ryerson had kept marijuana and a pellet gun; Agent Smith located a pellet gun, ammunition, a digital scale with white powdery residue on it and a pack of rolling papers. They returned to the garage; Lawicki reported that a tan duffle bag present on February 5, 2006 now was missing. When Agent Smith walked through the rest of the house with Lawicki she observed items belonging to a man, a woman and an infant.

Lawicki did not revoke, qualify or limit her consent to search at any time that evening. Lawicki never said or did anything that would have caused the agents to doubt her authority to consent to the search. The agents did not find a machine gun or any drugs that evening. The search ended around 9:30 p.m. Lawicki left with David Curley, stating that she was scared to spend the night at 911 Gillette.

Meanwhile, back at the Adams County Jail, at about 6:04 p.m. that same evening (February 9, 2006), Ryerson had placed an outgoing telephone call to Krumscheid to discuss the evolving situation with Lawicki. (*See* transcript, Government Exhibit 4.) Among other things, Ryerson expressed his concern that Lawicki would plant contraband in the house at 911 Gillette in order to obtain leverage in their child custody dispute. Ryerson also expressed concern that his firearms were in the house; Krumscheid assured him that he had put Ryerson's firearms in his car. Ryerson, however, reminded Krumscheid about "Marco's gun" by the drywall in the garage. Ryerson explained that there had been a hidden compartment for jewelry built into the drywall of the garage at 911 Gillette. Ryerson told Krumscheid that Marco's "little rapid fire BB gun" was hidden in that compartment; he directed Krumscheid to return to the house, tear open the drywall and get rid of the gun.[1]

Later that evening, at about 8:38 p.m. Ryerson attracted the attention of his jailers by claiming a heart condition. Sergeant Mickelson met with Ryerson, who was extremely agitated and verbose, but not in cardiac distress. Ryerson's distress arose from his fear that Lawicki would be planting evidence at 911 Gillette so that she could win the custody battle for their child. After determining that Ryerson was in no medical danger, Sergeant

[1] The timing is not entirely clear in the record, but it seems that Krumscheid would have conversed with Ryerson prior to driving to 911 Gillette to unlock the house for the consent search. One might have expected him to object to the search on behalf of his principal if Ryerson really were opposed to a search, but he did not.

Mickelson ordered Ryerson back into his cell. Ryerson then handed out a note that stated as follows (with spelling corrected):

> Dear Sergeant: My name is Richard Ryerson. My wife took my baby to an undisclosed location out of state and told me I would never see him so I crossed Ill border without permission. That's why I'm here. While I was in here she broke in the house and took lots of stuff. The house is in my name I just bought it.
>
> We have been divorced for three years, she doesn't have any name on the house, it is solely mine. She just stays with me as girlfriend now. My PO Jill Edwards and I are concerned of her planting illegal things in the house. My cab driver stays at my residence while I'm in here. My x girlfriend is sitting out in front of my driveway with her now boyfriend. He is a drug dealer and I think when they broke in last night they put something in my house or they want to go back in and do something tonight.
>
> Please may I talk to you ASAP.
>
> Rick Ryerson, Dells Cab Co. CEO

Deft's Exh. 6.

When Investigator Bitsky returned to the sheriff's department that night, the jailer handed him the note and reported that Ryerson had been complaining about medical issues. Based on this characterization, Bitsky put the letter on his desk without reading it and went home. He did not actually read it until late in the day on February 10, 2006.

The next morning, February 10, at about 7:30 a.m., Investigator Bitsky received a telephone call from a fellow investigator regarding Ryerson's call from the jail to Krumscheid the night before. Investigator Bitsky listened to the tape recording of that call, then called Lawicki and asked her to meet him at 911 Gillette. Investigator Bitsky explained that he

thought the deputies had missed a firearm when they had searched the house the evening before and he asked if Lawicki would give permission for them to search again, based on the information gleaned from Ryerson's phone call.

Even after listening to the telephone call between Ryerson and Krumscheid, Investigator Bitsky had no concerns about Lawicki's current authority to consent to the search: she had insisted throughout that she still lived there, and she still had property in the house demonstrating her continued residency.

Lawicki agreed to meet Investigator Bitsky at 911 Gillette that morning. Once again, Curley gave her a ride over. Bitsky presented Lawicki with another permission-to-search form dated February 10, 2006 which she signed at 8:49 a.m. Investigator Bitsky asked if she would enter the residence first; Lawicki indicated that she was not strong enough to kick the door open. With Lawicki's permission, Investigator Laudert forced open the door into the garage. The investigators used a thermal imager to search for "dead spots" in the wall. Lawicki saw them using the imager and did not protest. The deputies found two dead spots. They opened the first and found nothing. They opened the second and found a Thompson submachine gun. In the event the investigators had not had access to a thermal imager, they would have searched without one, directed by Ryerson's intercepted explanation to Krumscheid where to look.

ANALYSIS

Although the Fourth Amendment generally prohibits searches and seizures in the absence of a warrant, there is an exception when a person with either actual or apparent authority consents to the search or seizure. The authority justifying third-party consent rests on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his or her own right and that the others have assumed the risk that one of their number might permit the common area to be searched. *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974); *United States v. Groves*, ___ F.3d ___. 2006 WL 3375338 (7th Cir. Nov. 22, 2006). Either actual or apparent authority will do. *United States v. Rosario*, 733 F.2d 733, 737 (7th Cir. 1992). It is the government's burden to establish that a third party had the required common authority to consent to a search. *United States v. Denberg*, 212 F.3d 987, 991 (7th Cir. 2000).

Ryerson contends that Lawicki possessed neither actual nor apparent authority to consent to a search of 911 Gillette Lane. Ryerson is incorrect. Lawicki almost certainly had actual authority to consent to the searches. She had lived in the house with Ryerson and their child continuously for over ten months prior to the first search. Lawicki had left for her mother's with the baby on February 5, 2006 with the stated intent not to return, but in fact she changed her mind and she did return to the area to retrieve the baby from Ryerson. Because Lawicki was scared of Ryerson and his minions, she did not stay in the house

between February 5 - 10, but this does not establish that it was not still her residence. After all, Ryerson didn't stay there between February 5 - 10 either; during the relevant time period the house was unoccupied.[2] There was no legal or physical impediment to Lawicki continuing to live at 911 Gillette during this time; she simply chose not to do so. Therefore, I conclude that Lawicki had actual authority to consent to the searches on February 9 and 10, 2006.

Lawicki changed her tune and testified to the contrary at the evidentiary hearing, but her testimony was unbelievable on every material point. Lawicki essentially admitted on the stand that she will lie under oath to advance her agenda. Having reconciled with Ryerson, Lawicki now is lying in an attempt to undermine the government's case against him. But even if Lawicki were to have lied to the investigators and told the truth at the suppression hearing–a conclusion I reject–her persuasive words and corroborative deeds on February 9 and 10, 2006 sufficiently established to the investigators her apparent authority to consent to the challenged searches. Therefore, it was reasonable for the investigators to search the residence.

Law enforcement agents are entitled to a search a home without further inquiry if the facts available to them at the moment warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. *United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006), quoting *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). *See also*

[2] Krumscheid, the temporary caretaker, also declined to sleep there.

Georgia v. Randolph, ____ U.S. _____, 126 S.Ct. 1515, 1520 (2005) ("the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant"). The focus is on what is reasonably apparent to an officer who has made reasonable inquiry. Such a focus emphasizes the deterrent rationale underlying the exclusionary rule: obviously, reasonable police officers cannot be deterred by circumstances that are unknown or not reasonably apparent to them. Thus, the exclusionary rule should not be applied when it will not result in appreciable deterrence. *United States v. Grap*, 403 F.3d 439, 444-45 (7th Cir. 2006 (analyzing the validity of consent provided by a third party with psychiatric problems unknown to the police).

In *United States v. Rodriguez*, 88 F.3d 519 (7th Cir. 1989), the Seventh Circuit held that "just as police may have probable cause to act *even though their source was lying*, so they may act when the person giving consent has apparent authority." *Id*. at 523, emphasis added. Further,

> It is reasonable to act on the basis of apparently valid consent.
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> * * *
>
> Suppressing evidence because of what the police did not know at the time, even though their acts were justified on the basis of what they did know, would inject a random element into Fourth Amendment jurisprudence without serving any of the functions of the exclusionary rule. Denying police the ability to act on the basis of apparent authority would not deter improper conduct; it would instead deter acting on the basis of consents.

Rodriguez, 888 F.2d at 523.

So, even if Lawicki were to have lied to all the law enforcement agents on February 9 and 10, 2006 about her ongoing connection to 911 Gillette–a finding I reject–the consent searches still would be valid so long as it was reasonable for the police to believe Lawicki's assertions. I conclude that it was reasonable.

Courts have found that police reasonably relied on the apparent authority of a defendant's girlfriend based on her representations and her detailed description of the interior of the boyfriend's home, even though the police knew that she had her own residence and she did not have a key to the boyfriend's residence. *United States v. Gillis*, 358 F.3d 386 (6th Cir. 2004), cited with approval in *Goins*, 437 F.3d at 649. *See also United States v. Shelton,* 337 F.3d, 529, 534, n.19 (5th Cir. 2003)(collecting cases of third party consent by estranged spouses and significant others).

The facts found above amply establish that Lawicki had at least apparent authority to consent to all the searches of 911 Gillette. She repeatedly and unconditionally assured the investigators and the DCI agent that she had lived there for over ten months, still lived there despite a previous intent to move out, and still had her belongings and her baby's belongings in the house. She backed up these assurances with a detailed narrative of her personal and financial relationship with Ryerson and a detailed description of what would be found in the house. Upon entering the house to perform the first search, the deputies and Agent Smith were able to confirm the accuracy of Lawicki's descriptions, and they confirmed that clothing and effects belonging to a woman and an infant still were present in the house.

Lawicki gave a logical explanation for why she had no key to the house and why she had to break a window to enter on the evening of February 9. She explained why she was staying down the road after returning from Illinois rather than staying in the house. She denied having a romantic relationship with Curley. Given the tumult between Lawicki and Ryerson over the past few days, there was no reason for the deputies to doubt Lawicki's explanations. Indeed they explicitly asked Lawicki if she lived at the house now and whether she had received an eviction notice from Ryerson; Lawicki's answers quelled their concerns. (29:00-32:00 on the CD of the interview, Gov. Exh. 7, dkt. 14).

Ryerson's letter to the jail sergeant cannot affect this conclusion. First, Investigator Bitsky did not read it until after he had completed all of the challenged searches.[3] Second, Investigator Bitsky already had investigated the claim that Lawicki "broke in" to the house and had rejected it based on Lawicki's logical and persuasive explanation. Even if Investigator Bitsky had read this note before conducting the February 10 search, it would not have made his reliance on Lawicki's contrary representations unreasonable. Lawicki and Ryerson had just commenced a volatile, toxic child custody battle. Lawicki had presented a relatively calm, detailed version of events that was corroborated in part by the presence in the home of items belonging to a woman and an infant. The fact that Krumscheid, who presented himself as Ryerson's caretaker, had not voiced any objection to the February 9

[3] Ryerson, in his reply brief, accuses Investigator Bitsky of "willful blindness." *See* dkt. 15 at 5-6. This is an inaccurate characterization of what occurred.

search also would suggest that Lawicki did still have authority to enter the house. Contrast this with Ryerson, who had violated his state supervision to chase Lawicki to Illinois, then had lied to the jail sergeant to get her attention, then had bent her ear with a rambling diatribe against Lawicki. Ryerson himself seems to admit in his note that Lawicki still lives at 911 Gillette, stating that "she just stays with me as girlfriend now." It would not have been unreasonable for Investigator Bitsky to stick with Lawicki even if had read Ryerson's note before conducting the second search. Therefore, even if Investigator Bitsky had seen this letter prior to obtaining Lawicki's consent to search on February 10, it would not have undermined Lawicki's apparent authority to authorize the requested search.

Ryerson raises two secondary points that merit little discussion. First, he invokes *Randolph* to argue that his conversation with the jail sergeant on February 9, 2006, coupled with his subsequent letter, act as a veto on Lawicki's consent. This is incorrect. The *Randolph* decision is a narrow, formalistic exception to *Matlock*: "The question in this case [is] whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent." *Id* at 1526. The answer is that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id*. at 1525. Ryerson was not physically present on any of the occasions when Lawicki consented to the searches at 911 Gillette. Therefore *Randolph* offers him no succor. As the Court acknowledged,

> [W]e have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.
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> This is the line we draw and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Id. at 1527.

Ryerson was not physically present to object when Lawicki consented, so he "loses out." Further, his conversation with the jail sergeant and his letter do not specifically address the issue of consent searches for the obvious reason that no one had apprised him of Lawicki's consent and no one had sought consent from him. In short, *Randolph* has no application to Ryerson's situation.

Finally, Ryerson objects to the investigators' breaking the door and using a thermal imager to scan the inside of his garage. Lawicki explicitly authorized forcing the door, and she watched the investigators use the imager to check for dead spots in the garage drywall. A consentor's failure to object to a search that she sees occurring is an indication that the search is within the scope of her consent. *United State v. Torres*, 32 F.3d 225, 231 (7th Cir. 1994). Apart from this, the investigators had sufficient information from Ryerson's intercepted instructions to Krumscheid to find the hidden compartment on their own. Had

they not had an imager, they would have searched visually; inevitably they would have found the right spot. Therefore, suppression would not be appropriate. *See United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004)(government may use evidence obtained illegally if it would have obtained it legally in any event).

In short, the investigators and the DCI agent made reasonable inquiry, received believable answers from Lawicki and reasonably relied on her consent to search before entering 911 Gillette on February 9 and February 10, 2006. They did not violate Ryerson's Fourth Amendment rights when they searched the residence and seized the machine gun.

RECOMMENDATION

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

Entered this 22nd day of December, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge