U.S. v. SANTIAGO

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MEMORANDUM & ORDER

The Superseding Indictment in this case charges 12 defendantsin connection with a heroin distribution conspiracy. After aperiod of investigation, various search warrants were issued onthe basis of an affidavit of Drug Enforcement Administration("DEA") Special Agent Calice Couchman ("the Couchman Affidavit").Comprehensive searches were conducted pursuant to those warrantson October 15, 2004, and arrests were made in conjunction withthose searches.

Defendant Edwin Torres ("Torres") filed a motion to suppressevidence recovered, and all fruits thereof, from a search ofstorage unit J1 ("Unit J1"), located within a building at 3Foundry Street, Lowell, Massachusetts. Torres contends that thesearch and seizure were effected without a warrant, without probable cause and without lawful consent. This Court held anevidentiary hearing on Torres's motion to suppress on October 21,2005. After careful consideration of memoranda submitted by theparties and the evidence offered at the hearing, the Courtconcludes that the government has demonstrated, by apreponderance of the evidence, that it obtained valid consent tothe search of Unit J1.

I. Background

On the evening of October 14, 2004, a magistrate judge issued asearch warrant for the Mini Self-Storage facility located at 3Foundry Street in Lowell, Massachusetts. The warrant describedthe premises to be searched in detail as follows: The first floor of the storage building located at Mini Self-Storage, 3 Foundry Street, Lowell, Massachusetts is located in the left rear portion of the Mini Storage lot. It is located in a two story building with dark colored metal siding on the front of the building with white clapboard siding on the end of the building. A blue and white sign with the words, MINI SELF-STORAGE [sic] Tel 978-453-8206, printed on it, is located on the top right corner of the side of the building. The entrance to the first floor is located on the right end of the building as viewed from Foundry Street. The entrance consists of [sic] a set of solid white double doors. (A photograph of Mini Self-Storage, 3 foundry [sic] Street, Lowell, Massachusetts is attached as Attachment A-5).Attached to the search warrant were two photographs of a buildingthat was consistent with the above description and a thirdphotograph showing a single door with a sign reading "JADE" aboveit. It is not clear from the third photograph where the "JADE" door is located, i.e., whether it is part of the MiniSelf-Storage building in the other two photographs or an entirelyseparate structure. The Couchman Affidavit described variousevents involving Torres and the Mini Self-Storage facility butthere is no mention of a building with a single door bearing

a"JADE" sign. As it turns out, the door marked "JADE" providesentry to a small building that is very close but unattached tothe Mini Self-Storage building ("the JADE building").

On the morning of October 15, 2004, DEA agents arrested Torresat his residence in Lowell. Seven law enforcement officers wereon site at the time of the arrest. There they encounteredTorres's live-in companion, Elizabeth Alvarado ("Alvarado"), andtheir 17-Year-old daughter, Yesenia Torres ("Yesenia"). Most ofthe interaction between officers, Torres, Alvarado and Yeseniatook place in the kitchen, although Yesenia was not present theentire time. With respect to English language abilities, Alvaradoappeared to understand and speak none, Torres had a moderateunderstanding and spoke some, and Yesenia was reasonably fluent.

According to the arrest report and the testimony of Task ForceAgent Kevin Swift ("Swift"), Swift advised Torres of hisMiranda rights and Special Agent Drouin asked Torres to consentto a search of the upstairs and Torres's car. Torres consented tothose searches in broken, but understandable, English. Although he did not have with him a copy of the search warrantfor the rental storage space in Lowell, Swift informed Torresthat that space was going to be searched pursuant to a warrant.Torres immediately disclaimed any knowledge of storage space orof any acquaintance with the co-defendant, Julio Santiago("Santiago"). Yesenia, however, told the agents that somefurniture and clothes were in the storage space which belonged toher mother. Seeing some keys in the kitchen, Swift asked about aparticular set of keys and Yesenia replied that they were keys tothe storage facility.

At this point, the respective testimony of Swift and Yeseniadiverges diametrically. According to Swift, he asked if he coulduse the keys so as to avoid having to enter forcibly, and therebydamage, the storage facility upon executing the search warrant.He concedes that he never specifically asked for consent toaccess the storage area but testified that after he asked aboutthe keys, Yesenia conferred with Alvarado in Spanish. He sawAlvarado nod her head affirmatively during the conversation andYesenia then verbally assented to Swift's taking of the set ofkeys, which apparently included three keys. According to Swift,this interaction led him to believe that Alvarado had consented,through Yesenia, to a search of any storage facility that thekeys would open. He testified that 1) the officers never touched,threatened or yelled at either Yesenia or Alvarado at any time during the interrogation and 2) at the time of thearrest, he did not know that the keys provided. access to morethan one building located at 3 Foundry Street. While previouslyon surveillance, Swift had seen Torres enter the MiniSelf-Storage building but not the JADE building and he,personally, knew of no connection between Torres and the JADEbuilding.

In stark contrast, Yesenia testified that Swift never asked heror Alvarado for permission to take the keys; he simply took them.Yesenia testified further that she did not have a conversationwith Alvarado about the keys and that when Swift took them,Alvarado protested in Spanish. Although Yesenia informed theofficers of Alvarado's protest, Swift took the keys nevertheless.Yesenia also testified that the officers yelled at her and thather understanding of English was not very good but

she admittedthat the officers did not touch or threaten her or her motherthat morning.

After the arrest of Torres, Swift gave the keys to Task ForceAgent Brian Proulx ("Proulx"), identifying them merely as thekeys to the storage area. The key ring contained at least threekeys, two of which were covered in blue plastic. That morning,Proulx and several other officers used a key from the key ring toenter the Mini Self-Storage building described in the searchwarrant. From that facility they seized various documents. Theythen used a key on the same key ring to open the JADE building. Once inside, they saw multiple storage units, onlyone of which, Unit J1, was locked. The lock on Unit J1 was blue,matching the blue plastic on one of the keys that Swift hadprovided. Using that key, officers opened Unit J1 from which theyseized a variety of materials, including items related tonarcotics.

II. Analysis

Torres's motion to suppress, and the government's oppositionthereto, require the Court to answer three questions: (1) HasTorres demonstrated an expectation of privacy in Unit J1sufficient to enable him to challenge the search? (2) Did thescope of the search warrant for the Mini Self-Storage facilityencompass a search of Unit J1? (3) Did the government acquirevalid consent to a warrantless search of Unit J1? The Courtaddresses each question in turn.

A. Expectation of Privacy

The government contends, as an initial matter, that Torres hasfailed to assert "standing" to challenge the search of UnitJ1.[1] As a threshold matter in support of a motion tosuppress, the defendant must demonstrate that he had a"legitimate and reasonable expectation of privacy in the premisessearched or property seized". United States v. Dunning, 312 F.3d 528, 531(1st Cir. 2002) (citations omitted). The defendant bears theburden of persuasion on this issue. Rakas v. Illinois,439 U.S. 128, 130 n. 1 (1978); United States v. Cruz Jimenez,894 F.2d 1, 5 (1st Cir. 1990).

To prove a sufficient expectation of privacy, the defendant"must demonstrate not only that he exhibited a subjectiveexpectation of privacy, but also that his expectation wasjustifiable under the attendant circumstances". United Statesv. Lewis, 40 F.3d 1325, 1333 (1st Cir. 1994) (quoting CruzJimenez, 894 F.2d at 5) (internal quotation marks omitted). Inorder to meet this burden, the defendant must assert, orotherwise offer evidence of, a legitimate privacy interest in thesearched location at or prior to the suppression hearing. Cf.,e.g., Lewis, 40 F.3d at 1333 (holding that defendants did notshow a reasonable expectation of privacy in seized contrabandwhere they "failed to assert it in support of their motion tosuppress"); United States v. Bouffard, 917 F.2d 673, 676 (1stCir. 1990) (holding that defendant had not shown a reasonableexpectation of privacy in a shotgun or the vehicle from which itwas seized where there was "no assertion and no evidence" thatthe defendant had any privacy interest in the shotgun orvehicle).

In determining whether a defendant has shown a subjectiveprivacy interest, the First Circuit has "required little more than evidence that defendants made some minimal effort to protecttheir property or activities from warrantless intrusions".United States v. Cardona-Sandoval, 6 F.3d 15, 20-21 (1st Cir.1993). Whether the defendant has shown an objectively reasonableprivacy interest depends upon a contextual inquiry into factorssuch as "ownership, possession, control, ability to exclude fromthe premises, or a legitimate presence on the premises". Id. at21; see also United States v. Aguirre, 839 F.2d 854, 856-57(1st Cir. 1988).

This Court rejects the government's position that, by denyingknowledge of the storage space at the time of his arrest, Torreshas foregone his right to challenge the search of Unit J1.Although the amount of evidence is meager, it is sufficient toestablish that Torres had a legitimate expectation of privacy inUnit J1. He has submitted an affidavit in which he stated that hehad personal items stored in Unit J1 and that he had been makingpayments on the unit. In addition, Unit J1 was a locked storageunit on the same lot as the Mini Self-Storage facility with whichTorres had a connection, and keys to Unit J1 were on the same keyring as keys to the Mini Self-Storage facility. These factsindicate that Torres had some control over, and a possessoryinterest in, Unit J1. Consequently, Torres has demonstrated alegitimate expectation of privacy sufficient to challenge thesearch. B. Scope of Warrant

Although conceding that the description in the search warrantdid not refer to the JADE building or to Unit J1, the governmenthas tenuously suggested that the search of Unit J1 wasencompassed within the scope of the warrant. In making thatclaim, the government submits that the Court should consider theagents' good-faith belief upon executing the warrant.

Upon review of the evidence presented and applicableprecedents, the Court concludes that Unit J1 was not encompassedwithin the scope of the warrant as issued. First, it isimprobable that the magistrate judge believed there was probablecause to search Unit J1 or that he was issuing a warrant tosearch it. The Couchman Affidavit made no mention of Unit J1 orthe JADE building. If the magistrate judge saw the "JADE"photograph attached to the warrant, he likely believed that itdepicted an alternate view of the Mini Self-Storage building.

Second, the government's contention that its agents had agood-faith basis for believing that Unit J1 was encompassedwithin the scope of the warrant is suspect. The warrant on itsface clearly did not include Unit J1. Furthermore, thegovernment's good-faith reliance argument is untenable undergoverning precedent. Where law enforcement relies in good faithon a facially valid warrant that, as it turns out, has beenissued erroneously by a neutral and detached magistrate, the exclusionary rule does not apply. United States v. Leon,468 U.S. 897 (1984). The Leon exception flows from the rationalethat "where the officer's conduct is objectively reasonable,`excluding the evidence will not further the ends of theexclusionary rule in any appreciable way'". Id. at 920 (quotingStone v. Powell, 428 U.S. 465, 539 (1976) (White, J.,dissenting)). The circumstances of this case do not, however,warrant applicability of the Leon exception. The magistratejudge is not alleged to have

erroneously issued a facially validwarrant upon which the officers reasonably relied and thenexecuted within its scope. Agent Proulx's testimony made clearthat he knew the JADE building was not included either within thesearch warrant or the Couchman Affidavit upon which the warrantwas based. Consequently, his search of Unit J1 cannot havereasonably been based on a good-faith interpretation of thewarrant.

C. Consent

The government's principal argument in opposition to Torres'smotion to suppress bears upon consent. A warrantless search ispresumptively unreasonable unless it falls into an establishedexception, one of which is consent. See, e.g., United Statesv. Romain, 393 F.3d 63, 68 (1st Cir. 2004). The governmentbears the burden of demonstrating, by a preponderance of theevidence, that consent was "knowingly, intelligently, and voluntarily given". United States v. Marshall, 348 F.2d 281,285-86 (1st Cir. 2003) (citing United States v.Perez-Montanez, 202 F.3d 434, 438 (1st Cir. 2000)).

A person other than the defendant may give valid consent to asearch if he or she "possess[es] common authority over or othersufficient relationship to the premises or effects sought to beinspected". United States v. Matlock, 415 U.S. 164, 171(1974). The Supreme Court has defined "common authority" in termsof whether there was 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 own right and that the others have assumed the risk that one of their number might permit the common area to be searched.Id. at 171 n. 7.

Because there is no evidence suggesting that Torres himselfconsented to the search of Unit J1, the Court will addresswhether consent was obtained from Yesenia and/or Alvarado.

1. Apparent Authority to Consent

Where a third party lacks actual authority to consent to asearch, that party's consent is nonetheless effective where lawenforcement "reasonably (though erroneously) believe[d]" that thethird party had authority to consent. Illinois v. Rodriguez,497 U.S. 177, 186 (1990). See also United States v. Meada,408 F.3d 14 (1st Cir. 2005). Some factors to be considered indetermining whether "apparent" authority to consent was evident include therelationship between the defendant and third party, the degree ofaccess that the third party had to the searched premises andother indications of the third party's interest in the premises.See, e.g., Meada, 408 F.3d at 21; United States v.Robinson, 999 F. Supp. 155, 158-60 (D. Mass. 1998). Because thestandard for apparent consent is easier to meet than actualconsent, the Court will focus on whether the government agentsreasonably believed that Yesenia and/or Alvarado had authority toconsent.

In this case, it was reasonable for law enforcement to believethat Alvarado had actual authority to

consent to a search of theFoundry Street storage space. When Yesenia told Swift about thestorage area, she referred to it as her mother's. Similarly,Yesenia stated that the keys to the storage area found in thekitchen belonged to her mother. Swift's testimony that Yeseniaconferred with her mother about the keys further bolsters theposition that Alvarado had authority to consent to a search ofthat area.

It is also clear, however, that Yesenia did not have authorityto consent to the search. To rely on Yesenia's consent as a basisfor the search, the government must have reasonably believed thatYesenia had "common authority" over Unit J1. In Rodriguez,supra, the government obtained consent from the defendant'sgirlfriend to search the defendant's apartment. Although the girlfriend had moved out of that apartment one monthearlier, she still had furniture and household effects on thepremises as well as a key (though it is unclear whether thedefendant knew she had a key). The Supreme Court held inRodriguez that the foregoing facts did not adequatelydemonstrate the girlfriend's actual authority to consent to thesearch. 497 U.S. at 181. The Supreme Court did not considerwhether officers reasonably believed that the girlfriend hadauthority to consent. It therefore remanded the case for adetermination of apparent authority. Id. at 189.

Rodriguez demonstrates that having access to a place and evensome ownership interest in possessions within that place isinsufficient to establish actual authority. Applying thereasoning of Rodriguez to this case, it does not appear thatYesenia had actual authority to consent to the search. Under thecircumstances, moreover, it would not be reasonable for agents tohave believed that Yesenia had such authority. The agents werenot seeking consent to search the Alvarado residence whereYesenia herself lived. They intended to search an off-sitelocation whose only known connection to Yesenia was through herrelationship to Torres and Alvarado and her identification of thekeys. That evidence is insufficient to show a reasonable beliefin Yesenia's "common authority over or other sufficientrelationship to" the storage area at issue. Matlock, 415 U.S.at 171.

2. Voluntariness of Consent

Whether consent was given voluntarily is determined uponconsideration of the totality of the circumstances. Schnecklothv. Bustamonte, 412 U.S. 218, 227 (1973); Romain,393 F.3d at 69 (citing Schneckloth, id.). Consent is involuntary where itresults from express or inherent coercion, Schneckloth,412 U.S. at 228, or where the consenting person lacked sufficientunderstanding to consent, cf. United States v. Luciano,329 F.3d 1, 7-8 (1st Cir. 2003) (concluding that defendantdemonstrated sufficient understanding of English to render hisconsent effective). Factors to be considered in evaluatingvoluntariness include "age, education, experience, knowledge ofthe right to withhold consent, and evidence of coercive tactics".Marshall, 348 F.3d at 286 (citing United States v. Twomey,884 F.2d 46, 51 (1st Cir. 1989)). Acquiescence to authorities canbe deemed voluntary or involuntary consent, depending on thesurrounding circumstances.

Because it was reasonable in this case for law enforcementagents to believe that Alvarado had actual

authority to consentbut not that Yesenia had such authority, the government mustdemonstrate that Swift reasonably believed he obtained voluntaryconsent from Alvarado. Although the available facts make this aclose question, after considering all of the testimony elicited at the hearing and the materials submitted by the parties, theCourt finds that Swift reasonably believed that Alvarado providedvoluntary consent to the search. As between the conflictingtestimony of Swift and Yesenia, the Court finds the testimony ofSwift more credible.

After Torres consented to a search of the upstairs of hisdwelling and his car, Swift asked him about the Foundry Streetstorage space. When Torres disavowed any knowledge of such afacility and of any acquaintance with Santiago, Swift had reasonto believe he was lying. During the investigation leading up tothe arrest, Swift had personally witnessed Torres at the MiniSelf-Storage facility. Thus, when Yesenia indicated that therewas indeed a storage facility, Swift directed his attention tothe two women and the possibility of gaining unforced entry.While it is unlikely that Swift asked for the keys that heobserved politely, there is no evidence that he manipulated,forced or otherwise threatened Yesenia or Alvarado into givinghim the keys to the storage facility.

That Swift did not coerce the women into handing over the keyscomports with a common-sense understanding of the situation. Atthe time, Swift had no reason to believe that he needed the keysto execute the search of the storage facility, which had beenauthorized by a warrant. Without any knowledge of a connectionbetween Torres and the JADE building, Swift had no reason to know or suppose that a warrantless search of Unit J1would be conducted. Because it is reasonable to presume thatSwift believed the search would be validly executed with orwithout keys, it is likely that, had Alvarado truly protestedabout the keys, Swift would not have taken them but would havesimply proceeded to conduct a forced entry as planned. Althoughit is unclear to what extent Alvarado understood the conversationin English between Yesenia and Swift, the Court finds credibleSwift's testimony that he saw Alvarado nod during a Spanishconversation between her and Yesenia and that he then obtainedthe vicarious assent of Yesenia to his possession of the keys.Under those circumstances, it was reasonable for Swift to believethat Alvarado had voluntarily consented to the search for themutually beneficial purpose of avoiding damage to the storagefacility.

In contrast to the generally credible testimony of Swift,Yesenia's testimony was fraught with inconsistencies. AlthoughYesenia seemed to have a modest intellect and is a high schoolgraduate born and raised in the United States, she claimed thatshe did not understand English well. Other statements were alsoof questionable veracity. For instance, initially, Yesenia seemedto deny 1) having any acquaintance with the defendant, Torres, 2)that there was any relationship between Torres and her mother or3) that Torres lived at the residence where he was arrested. Later, however, she referred to Torres as her "Dad" andconceded that she had known him since she was a baby and thatthey had lived together in Lowell for many years. At anotherpoint, Yesenia testified that she had never heard Torres speakany English, which was in stark contrast to Swift's credibletestimony that Torres had spoken "broken", but understandable,English on the morning of his arrest.

3. Scope of Consent

After the government has demonstrated that a third person hadapparent or actual authority to consent to a search, and thatconsent was voluntary, the government must still show that itssearch did not exceed the scope of consent given. E.g., UnitedStates v. Turner, 169 F.3d 84, 87 (1st Cir. 1999) (citationsomitted). Scope of consent is determined by a test of objectivereasonableness: "what would the typical reasonable person haveunderstood by the exchange between the officer and the subject?"United States v. Melendez, 301 F.3d 27, 32 (1st Cir. 2002)(quoting Florida v. Jimeno, 500 U.S. 248, 251 (1991)). Thus,courts must look "beyond the language of the consent itself, tothe overall context, which necessarily encompassescontemporaneous police statements and actions". Turner,169 F.3d at 87. Context is important because "[t]he scope of a[consensual] search is generally defined by its expressedobject". Jimeno, 500 U.S. at 251. In this matter, therefore, the government must show that thesearch it executed pursuant to Alvarado's consent was within thescope of that consent. At the time of Torres's arrest, Swiftdescribed the area to be searched in a general manner, referringto it no more specifically than as the storage space at 3 FoundryStreet in Lowell. There is no evidence that Swift referredexplicitly to the Mini Self-Storage building nor that he had acopy of the warrant in hand. Based on the "expressed object" ofthe search, the Foundry Street storage facility, the Court findsthat the search of Unit J1 was within the scope of consent.

That Swift himself may have believed that the Mini Self-Storagebuilding was the only location to be searched does not define thescope of consent. Rather, it is defined by that to which areasonable person under the circumstances would have believedconsent was given. In this case, a reasonable person would likelyhave believed that consent was given to search any storage areaat 3 Foundry Street, Lowell, to which the keys provided access.There is no reason to believe that Alvarado, when she consented,via Yesenia, impliedly understood that the search would belimited to the Mini Self-Storage building. Consequently, onceAlvarado consented to the search, Unit J1 was within the scope ofthat search. ORDER

Based on the foregoing memorandum, the motion to suppress ofdefendant Edwin Torres (Docket No. 124) is DENIED.

So ordered.