

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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| UNITED STATES OF AMERICA |) | |
| |) | |
| v. |) | Criminal No. 04-61-P-H |
| |) | |
| ALBERTO A. GONZALEZ, |) | |
| |) | |
| Defendant |) | |

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Alberto A. Gonzalez, charged as a convicted felon with possessing firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), seeks to suppress evidence gathered and statements made in Apartment 4A at 22 Park Avenue in Portland, Maine on January 30, 2004. Indictment (Docket No. 4); Defendant’s Motion to Suppress Evidence (“Motion”) (Docket No. 22) at 1-2. An evidentiary hearing was held before me on September 1, 2004. The government called one witness and introduced four exhibits, three of which were admitted without objection and one of which was admitted over objection. The defendant called one witness and offered no exhibits. Counsel argued orally at the end of the hearing. Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the motion to suppress be granted in part.

I. Proposed Findings of Fact

Sandra Sneiderman is a social worker employed by the YWCA in Portland, Maine, in its transitional program. She provides community integration services to clients who reside in seven apartments at 22 Park Avenue in Portland. On January 30, 2004, just before 11 a.m., she was called in her first floor

office by a resident of a third floor apartment who was frightened by screaming in the apartment above. That apartment, number 4A, was occupied by Beth Stewart, the defendant Alberto Gonzalez (also known as Alexi) and their infant daughter. Carrying her telephone, Sneiderman went up to the door of Apartment 4A, through which she could hear the defendant screaming. She banged on the door and the defendant let her in. He was very upset and told Sneiderman that he thought that Stewart had overdosed on something. He took her into the bathroom, where Stewart was unconscious in the bathtub, with cold water running over her.

Sneiderman called 911. Police and MEDCU, the ambulance service, arrived about five minutes later. The technicians asked Sneiderman to leave the apartment; she waited in the hallway until Stewart, who had been revived, was assisted down the stairs. Sneiderman then re-entered the apartment, where two police officers remained with the defendant, and obtained the defendant's permission to take his daughter down to the office. She went to her office, called the Department of Human Services and spoke to co-workers and a supervisor.

Scott Pelletier, a supervisory special agent with the Maine Drug Enforcement Agency, was called to the scene to conduct a routine investigation of a suspected drug overdose. When he arrived, the defendant and uniformed officers Davis and Clavett were in the apartment. Davis told Pelletier that the police and MEDCU had been called to the apartment for an alleged heroin overdose, that they had found an unconscious young female in the bathroom and that she had regained consciousness before being transported to Mercy Hospital. Davis then left.

The defendant appeared to be upset, moving around the living room and saying "How could she have done this to us," among other things. Pelletier told the defendant who he was and that he was there to investigate the circumstances of the overdose, to find out what drugs had been used and whether there were

any other drugs in the apartment, so that the hospital could have the best possible information on which to base its treatment of Stewart. Pelletier did not attempt to restrain the defendant or to pat him down. He asked what had happened and the defendant told him that there was nothing to investigate. He said that Stewart had used heroin without his knowledge and that after he had found her unconscious he had flushed two packages that may have contained heroin down the toilet. Pelletier told the defendant that flushing the heroin away was itself a crime for which the defendant could go to jail, but that Pelletier was not out to get the defendant but only wanted to find out about the drugs that Stewart had used.

Pelletier asked the defendant for his consent to search the apartment. The defendant asked Pelletier whether he needed a warrant to do that. Pelletier explained that he could get a warrant but that he could also search if a resident of the apartment gave him permission to do so. Pelletier again asked for permission, and the defendant asked to speak to his counselor. The defendant went out into the hall and called for Sneiderman. Pelletier then went down to the first floor office, introduced himself to Sneiderman and escorted her up to the apartment. Once in the apartment, Sneiderman observed Pelletier telling the defendant that he needed to search the apartment because there had been a drug overdose and whenever there has been an overdose there is a need to find out what the victim took and how much in order to get the victim the best possible care in the hospital. The defendant said that it was not necessary for Pelletier to search because he would look around the apartment himself. Pelletier reiterated that he was not there to “bust” the defendant but needed to find out what was going on.

Sneiderman and the defendant went out into the hall while Pelletier and Clavett remained in the apartment. In the hallway, the defendant said to Sneiderman that she could not let them do this, he did not want this to happen, this was his business and his space and she could not let this happen. Sneiderman

replied that this was not her decision to make; the defendant had to decide whether to agree to the search. They went back into the apartment.

The defendant sat on the couch and Pelletier, standing on the other side of a coffee table in front of the couch, told him that he did not have to consent to the search and then read him the entire form for written consent to search that is Government Exhibit S2. The defendant was hesitant to sign the form and asked what would happen if he did not sign it. Pelletier said that he would then have to get a search warrant. The defendant said that he wanted to be in the apartment while it was searched and then signed the form. Sneiderman signed as a witness. After signing the form, the defendant said, "This is bullshit." Both before and after the defendant signed the form, Pelletier told him that he did not have to stay at the apartment and suggested that the defendant might want to go to the hospital to be with Stewart. At one point, the defendant started picking up clothing to take to Stewart but then said, "No, I'm going to stay."

According to Pelletier, after obtaining the written consent, he first searched the bathroom and then the area around the couch and entertainment center in the living room. He asked the defendant, who continued to stand, pace, pick up clothes and sit, whether there were any weapons in the apartment. The defendant said that the only weapons were two small replica samurai swords in the entertainment center. After finding nothing in the bathroom and living room, Pelletier asked the defendant where Stewart might have put drugs. The defendant said that there were only two places where she might hide drugs, walked into the bedroom, knelt and began to open the bottom drawer of a dresser near the door. Pelletier asked the defendant to let him do the searching, and the defendant moved out of the bedroom. Pelletier asked the defendant to sit in a chair that had been placed in the living room near the door to the bedroom, from which the defendant could watch as Pelletier searched the bedroom, and the defendant sat in that chair. Pelletier found two rounds of ammunition on top of the dresser and on or in a box beside the dresser found two

boxes of ammunition, one .38 caliber and one 9 mm. He asked the defendant about the ammunition on top of the dresser and the defendant replied that they were just antiques.

Pelletier then asked the defendant why there was ammunition in the bedroom if there were no firearms in the apartment. The defendant said that Stewart had purchased two guns in Windham and he thought that she had taken them to her father's house; he added that he was a convicted felon and was not allowed to be around guns. Pelletier then called another agent and asked him to go to the hospital to check on Stewart and to ask her whether there were firearms in the apartment. He then lifted the mattress on the bed and found a small dark Walther handgun in a holster¹ and a tin box in which he found drug paraphernalia. Pelletier then called the Superior Court in Portland to confirm the defendant's statement that he was a convicted felon.

When Pelletier said to the defendant, "I thought you told me there were no guns here," the defendant responded that the gun was one of those that he thought Stewart had taken to her father's house. On the nightstand beside the bed, Pelletier found a semiautomatic magazine for 9 mm. bullets, which did not match the gun he had found in the bed. On the floor was an empty plastic case for a gun, marked "Ruger." The agent who had been sent to the hospital then called Pelletier and told him that Stewart had said that she had used two bags of heroin and that two more bags were in the apartment in a coat, that she had purchased two guns in Windham for herself and her father, that the guns were in a closet and that the defendant would know where they were. Pelletier told the defendant what Stewart reportedly had said; the defendant then said that the only gun he knew about was one on a shelf in the bedroom closet.

¹ Sneiderman testified that she was sure that Pelletier found this gun in the dresser. I credit Pelletier's testimony on the location of the first gun that he found.

Pelletier then located a replica Smith & Wesson 6-shot .38 caliber revolver in the closet. The magazine that Pelletier had found on the nightstand did not match either gun that Pelletier had found. He then handcuffed the defendant and told him that, while he was not under arrest, he was not free to leave and that he would be arrested when and if Pelletier was able to confirm that the defendant was a convicted felon. Pelletier continued searching and in the bedroom closet found a denim jacket with five .38 rounds in the pocket.² He held up the jacket and asked the defendant if it was his; the defendant said that it was and that there should be a matching pair of pants in the closet. Pelletier found the matching pants in the closet. Pelletier then received a call from the Superior Court confirming that the defendant had been convicted of Class C burglary. Pelletier then told the defendant that he was under arrest for possession of a firearm by a felon. He called the Portland Police Department for another uniformed officer so that the defendant could be transported to jail. He continued searching and found additional items which he seized.

The door to the apartment was open at all times after Pelletier arrived. No *Miranda*³ warnings were given to the defendant before he was taken out of the apartment after being arrested.

According to Sneiderman, before signing the consent form the defendant said, “I feel like I’m going to be screwed either way.” She said that, while Pelletier was searching the apartment and before he found the guns but after he saw the ammunition on top of the dresser, the defendant was repeatedly getting up and moving around the apartment; after asking him to sit down more than once, Pelletier said to him words to the effect of “You need to cooperate and sit down. I need to get my job done. If you’re going to continue to do this you can sit down and cooperate or I can take you

² Sneiderman testified that Pelletier found this jacket on the couch in the living room. I find Pelletier’s testimony concerning where and when he found the jacket to be more reliable.

³ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

down to the jail because you're obstructing the investigation at this point." She also testified that this remark was made after Pelletier found the jacket with the bullets in the pocket but before the defendant was asked to sit in the chair. Sneiderman testified that the defendant did not want Pelletier to search even though he had consented to the search; at one point the defendant told Sneiderman that a friend had come over who might have left a gun in the apartment and that since the defendant was a convicted felon, he would be blamed if Pelletier found a gun. She testified that when Pelletier found the guns, he asked the defendant whose guns they were and what the defendant was doing with them. She knew that the defendant was free to leave the apartment before she heard Pelletier's comment about the jail; whether the defendant was free to leave after that comment was not discussed.

II. Discussion

The government initially suggested that the defendant might lack standing to object to the search of the apartment, Government's Objection of Defendant's Motion to Suppress (Docket No. 32) at 7, but the only evidence on this point submitted at the hearing was Sneiderman's testimony that the defendant was a resident of the apartment at the relevant time. *See generally United States v. Bouffard*, 917 F.2d 673, 675-76 (1st Cir. 1990). Sneiderman's testimony also established that the defendant, Stewart, program counselors and maintenance personnel had keys to the apartment and that every effort was made to give residents the same degree of privacy that they would have in an apartment in the community. This evidence is sufficient to show that the defendant had a reasonable expectation of privacy in the apartment, another prerequisite for a challenge to seizure of evidence from the premises. *Id.* at 675. I therefore will not consider this issue further.

The defendant contends that his consent to the search was not voluntary. Motion at 4. "Proof of valid consent requires that the prosecution show, by a preponderance of the evidence, that the consent was

knowingly, intelligently, and voluntarily given.” *United States v. Marshall*, 348 F.3d 281, 285-86 (1st Cir. 2003). Factors to be considered in determining whether consent was voluntarily given include “age, education, experience, knowledge of the right to withhold consent, and evidence of coercive tactics.” *Id.* at 286. Here, the defendant was 24 years old. Government Exh. S4. He has had considerable experience with the criminal justice system. Government Exh. S4. Both Pelletier and Sneiderman testified that the defendant was told that he did not have to consent to the search. During his oral argument, counsel for the defendant referred to the defendant’s emotional state at the time he signed the consent form, suggesting that it rendered him unable to understand the form that Pelletier read to him, but did not identify anything done by Pelletier or any other officer as inherently coercive.

On the first point, the evidence makes clear that the defendant understood that Pelletier was seeking his consent to search the apartment and that he could refuse to consent. His conversation with Sneiderman in the hallway confirms this. The evidence also shows that the defendant chose to consent because he wanted to be present during the search and believed that might not be possible if Pelletier had to obtain a search warrant. On the second point, the officers who initially responded to Sneiderman’s 911 call were in uniform and armed; Pelletier was in plain clothes and carried a concealed weapon. There is nothing so inherently coercive about these facts that a reasonable factfinder could conclude that the defendant’s free will was overborne. Pelletier told the defendant that he would seek a search warrant if the defendant did not consent to the search, but “the fact that the officers told [him] that they were going to search the apartment regardless of whether [he] consented because they intended to get a warrant is not inherently coercive.” *Marshall*, 348 F.3d at 286. “Consent is voluntary if it is the product of an essentially free and unconstrained choice.” *United States v. Chhien*, 266 F.3d 1, 7 (1st Cir. 2001) (citation and internal quotation marks omitted). The fact that the defendant would have preferred that the apartment not be

searched is not a relevant consideration. “There is not a shred of evidence here that [Pelletier or the Portland police officers] tricked, threatened, or bullied [the defendant] into agreeing” to the search, *id.*, and the evidence establishes that his consent was voluntary.

The defendant next contends that any statements he made while Pelletier was in the apartment must be suppressed because he was in custody but had not been given *Miranda* warnings. Motion at 3-4. The motion identifies the moment when the defendant was placed in custody as the moment when he was “told” by Pelletier to sit in the chair that had been placed near the door to the apartment. Motion at 3. At oral argument, counsel for the defendant contended that the defendant was placed in custody by Pelletier’s remark about the possibility of taking the defendant to jail for interfering with his investigation if he did not stop moving around the apartment during Pelletier’s search. Accordingly, any statements made before the earlier of these two events are not the subject of the defendant’s motion.

Sneiderman, the only witness who testified about Pelletier’s taking-to-jail remark, testified that it was made before the defendant was asked to sit in the chair and after Pelletier had seen the bullets on the dresser and found the bullets in the pocket of the defendant’s jacket. Whatever the relative timing of the remark, which I find was made by Pelletier, it cannot reasonably be construed to have placed the defendant in custody.

An officer’s obligation to administer *Miranda* warnings attaches . . . only where there has been such a restriction on a person’s freedom as to render him in custody. In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Stansbury v. California, 511 U.S. 318, 322 (1994) (citations and internal punctuation omitted). The test is objective: how a reasonable man in the defendant’s shoes would have understood his situation. *Id.* at 324.

Here, the remark cannot reasonably be construed to convey to the defendant that he was not free to leave the apartment. The only reasonable construction is that the defendant was being told that if he insisted on staying in the apartment during the search (rather than leaving as he was previously told he was free to do), he would have to stay in one place; otherwise, he would be arrested for interfering with Pelletier's investigation and taken out of the apartment, to the jail. The same is true of Pelletier's request that the defendant sit in the chair that had been placed so that the defendant could see what Pelletier was doing in the bedroom. Nothing in that request may reasonably be construed to convey to the defendant that he was not free to leave the apartment; rather, it was a solution that allowed Pelletier to continue his search unimpeded by the defendant's darting around the apartment while allowing the defendant to watch the search, as he had indicated he wished to do. Both Sneiderman and Pelletier testified that the defendant was not told when he sat in this chair that he was no longer free to leave.

It is possible that the defendant means to argue that the combination of the request that he sit in the chair, Pelletier's remark and other circumstances combined to place him in custody at some point. In order to evaluate the restraint on freedom of movement present in a particular set of circumstances, a court must consider

whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation.

United States v. Ventura, 85 F.3d 708, 711 (1st Cir. 1996) (citation and internal quotation marks omitted). Here, at the time the defendant was asked to sit in the chair and the remark had been made, two law enforcement officers were present in the defendant's residence and the only physical restraint placed on him was a direction not to move around inside the apartment to places where Pelletier could not see him or

where Pelletier had not yet searched. Pelletier's search, and thus his questioning of the defendant, had not extended for more than a few minutes at this point, and none of the questions Pelletier reported asking up to this point⁴ can reasonably be characterized as questions likely to elicit an incriminating response from the defendant. *See id.* These circumstances, taken together, cannot reasonably be characterized as amounting to such a restraint on the defendant's freedom of movement that he must be deemed to have been in custody at that time.

One other point at which the defendant may have been placed in custody must be considered. Pelletier testified that, after he found the second gun, he handcuffed the defendant and told him that, while he was not under arrest, he was not free to leave and that, when Pelletier confirmed that the defendant was a convicted felon, he would be arrested and taken to jail. Pelletier testified that thereafter he continued to search the closet and found five .38 caliber rounds in the pocket of a denim jacket, held the jacket up in front of the defendant and asked if the jacket belonged to the defendant. The defendant replied that it was his jacket and that a matching pair of pants could be found in the closet. After this colloquy, Pelletier received a telephone call from the Superior Court, confirming that the defendant was a convicted felon. Pelletier then told the defendant that he was under arrest and arranged for him to be transported to the Cumberland County Jail.

Under the circumstances, Pelletier's question about the jacket was designed to elicit incriminating information.⁵ Despite the fact that Pelletier told the defendant that he was not under arrest when he

⁴ Sneiderman did not testify about any questions asked of the defendant by Pelletier before he made the remark about the jail.

⁵ If Sneiderman's testimony is credited on this point, there was no *Miranda* violation, because Pelletier found the jacket on the couch before he went into the bedroom and thus before he handcuffed the defendant. As previously noted, on this point I find the testimony of Pelletier as to the relative timing of events to be more reliable than that of Sneiderman. This conclusion is buttressed by Pelletier's evidence log, which lists the jacket and bullets after the guns, which were (*continued on next page*)

handcuffed the defendant, he also told the defendant that he would be arrested once Pelletier confirmed that the defendant was a convicted felon. The defendant knew at that point that he was a convicted felon and thus knew that he would be formally arrested. A reasonable individual in the defendant's place would have known that formal arrest was imminent and that there was no possibility that he would be free to leave the apartment after that moment. The degree of restraint on the defendant's movement at this time can only reasonably be characterized as consistent with an arrest. Accordingly, the defendant should have received *Miranda* warnings at this time. The fact that he did not means that any incriminating statements made after the handcuffing and accompanying statement by Pelletier must be suppressed. *See generally United States v. Faulkingham*, 295 F.3d 85, 90 (1st Cir. 2002).

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be **GRANTED** only as to any statements made by the defendant on January 30, 2004 in Apartment 4A at 22 Park Avenue in Portland, Maine, with respect to the denim jacket, its contents and the matching pants found in a closet at that address by any law enforcement agent and as to any incriminating statements made by the defendant after he was handcuffed on that date by Supervising Special Agent Scott Pelletier and before he was given *Miranda* warnings, and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

found in the bedroom. Government Exh. S3.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of September, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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