

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 02-32-B-S
)
MICHAEL DAVID MCMACKIN,)
)
Defendant)

RECOMMENDED DECISION ON DEFENDANT'S
MOTION TO SUPPRESS

Michael David McMackin moves to suppress both tangible evidence and statements in this credit card fraud case. (Docket No. 7.) His motion challenges (1) the lawfulness of his initial detention; (2) the warrantless search of his residence conducted while he was in custody; and (3) the admissibility of statements made to law enforcement officials after the initiation of formal charges. I now recommend that the court adopt the proposed and largely undisputed findings of fact and **DENY** the motion as it relates to statements made by the defendant at the time of his initial detention and those portions of the motion relating to the seizure of tangible evidence from his residence and **GRANT** the motion as to statements obtained in violation of McMackin's Sixth Amendment rights.

1. The lawfulness of the original detention

McMackin argues that there was no probable cause for his arrest. However, he does not dispute that by the time the Piscataquis County Sheriff's deputies detained him, law enforcement officers had garnered the following information surrounding the unlawful use of Nghia Bui's credit cards:

1. Information from Steven Hall, a realtor who was managing Nghia Bui's affairs during his extended visit to Vietnam, that on January 10, 2002, he rented Nghia Bui's furnished house at 4 Spring Street, Guilford, Maine, to McMackin and his girlfriend Barbara Savoie;
2. Information from Nghia Bui and Steven Hall that before Mr. Bui left for Vietnam on January 16, 2002, he paid all of his credit card bills in full and did not authorize anyone to use them in his absence;
3. Information from Steven Hall that on or about February 8, 2002, Discover Card sent a letter to Mr. Bui's Guilford post office box indicating that charges on his account appeared suspicious;
4. Information from Steven Hall that on March 4, 2002, McMackin visited Mr. Hall's place of business and pressured Mr. Hall's secretary for the key to Mr. Bui's Guilford post office box, ostensibly because he was having personal mail delivered to it. When she refused, he accompanied her to the post office for four days to see what mail Mr. Bui received. No mail was ever delivered for McMackin;
5. Information from MBNA America that on March 4, 2002, an unidentified caller made consecutive calls to MBNA to change the billing address on Mr. Bui's two MBNA credit cards from the Guilford post office box to P.O. Box 67, Kenduskeag, Maine. One of the calls was placed from Mr. Bui's residence. The caller recited Mr. Bui's name, date of birth, social security number, telephone number, and mother's maiden name;
6. Information from Mr. Hall that on March 9, 2002, he opened a monthly statement for Mr. Bui's MBNA credit card and found that between February 9 and February 26, 2002, extensive charges had been placed on the card in Massachusetts, New Hampshire and Maine. On February 17 or 18, McMackin called Mr. Hall from Massachusetts, saying he was there selling a car and would be late on his rent payment. On February 28 McMackin came to Mr. Hall's office and paid the rent;
7. Information from MBNA that the last and largest charge on Mr. Bui's credit card was for \$2,094.00 to an auto dealer in New Hampshire. When McMackin returned to Maine on February 28, Mr. Hall observed that he was driving a vehicle different from the one he left in earlier in the month;
8. Information from Mr. Hall that on March 10, 2002, he learned from MBNA that the charges on Mr. Bui's credit cards totaled \$6,694.09 and \$1,229.00.

In addition to this information, Sheriff Goggin also testified that the pattern of charges on the credit card statements suggested that the person using the cards had traveled from Piscataquis County to Massachusetts and back again during the relevant

time period. It is also undisputed that following the officers' seizure of the defendant at a parking lot in Guilford, Maine he was transported to the department's headquarters in Dover-Foxcroft, properly advised of Miranda rights, and waived the same. McMackin then made damaging admissions about his involvement in the credit card misuse.

He now argues that those statements should be suppressed because the officers did not have probable cause to arrest him. He bases this argument in large part on the fact that the officers themselves, at the time of the "seizure," announced that they were taking McMackin into custody to obtain the proper identification from him and to question him about Bui's credit cards, not because they were charging him in connection with the credit cards. McMackin argues that in the absence of probable cause the officers could not seize him in the manner they did and that any statements obtained from him should be suppressed under Brown v. Illinois, 422 U.S. 590, 603 (1975) because of the direct link and short lapse of time between the unlawful custodial detention and the purported waiver of Miranda.

McMackin is correct in his statement of the law, but wrong in his analysis of the facts. "Probable cause exists [for a warrantless arrest] if, at the time of the arrest, the collective knowledge of the officers involved was 'sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense.'" United States v. Link, 238 F.3d 106, 109 (1st Cir. 2001) (citing United States v. Bizier, 111 F.3d 214, 216-217 (1st Cir. 1997)). The officers in this case had far more than a mere hunch or articulable suspicion. They had a sizable trail of circumstantial evidence stretching from Guilford, Maine to Massachusetts and back. They had evidence that McMackin expressed an unexplained curiosity about Bui's mail. They knew that Bui had not

authorized anyone to use his credit cards and that he was not using them himself to make purchases in this country. Perhaps most significantly they knew that a call had been placed from Bui's residence to MBNA about the credit cards and that the caller possessed personal information relating to Bui. McMackin and his girlfriend were the individuals in possession of that residence and it was more probable than not that one of them placed the call. Since McMackin had been the one to express interest in Bui's post office box, the one who admitted he went to Massachusetts, and the one who had trouble paying his rent but was able to purchase a new motor vehicle, the police had sufficient probable cause to arrest McMackin in connection with the credit card misuse. The statements obtained subsequent to that arrest should not be suppressed.

2. The search of residence

Once more the evidence is largely undisputed. After McMackin had been taken into custody, Sheriff Goggin and Detective Young went to Bui's residence, ostensibly to return the dog that McMackin had with him at the time of his arrest, but also to speak with Barbara Savoie, his roommate and girlfriend. They approached a door to the shed attached to the residence. Savoie responded to their knock and allowed them into the entryway. She was still wearing her nightgown and had thrown a jacket over it to go into the shed area to answer the door. She was surprised to see the officers with the puppy and expressed her concern. The officers advised her that they needed to speak with her about McMackin and that he was in custody with other officers.

Although allowing them into the entryway, Savoie did not invite the officers into the house. Instead, she asked that she be allowed to go into the house and get dressed and that then she would return to speak to them. The officers assented and Savoie took the

puppy and went into the house. She disappeared from the officers' sight for perhaps not even a minute and then returned to the kitchen door, still in her night clothes. She opened the kitchen door and asked the officers to please leave and come back in fifteen minutes. The officers declined to leave.¹ They were still in the shed area, but had migrated closer to the kitchen door than they were when Savoie first left them in the entryway.

After the officers refused to leave, Savoie again closed the kitchen door and according to Young disappeared from sight.² She came back into the kitchen and proceeded to walk past the kitchen table. That table had a large number of papers strewn across it and as Savoie walked by it she picked up a handful of the papers and clutched them to her chest. Young and Goggin were by this time close enough to the kitchen door to be able to see her movements. Young believed she was collecting evidence to destroy it and he proceeded to open the kitchen door and step into the kitchen area. Savoie was told by Young that they really needed to talk with her now and that she should not be

¹ This point presents the most hotly contested evidentiary dispute in the case. Ms. Savoie says she asked the officers to please leave and come back in fifteen minutes. The officers say she never asked them to leave. In fact, Sheriff Goggin's testimony is as follows:

Q: All right. And at that point she asked you to leave the premises?

A: No, no, she did not.

Q: Okay. At this point she asked you to come back in 15 minutes?

A: That's correct.

Q: Do you have any idea where she was asking you to come back from?

A: I have no idea where she thought we were going to come back from.

Q: Would you agree you had to leave to come back?

A: I guess we would have had to have left to have come back, yes, I would agree to that.

Q: So then she did, in fact, although not saying, I want you to leave and come back, she did, in fact, - - you could infer from what she said that she wanted you to leave?

A: I didn't infer that at all, no.

Based upon the testimony I heard, I do find that Savoie asked the officers to leave and come back in fifteen minutes. They politely refused to do so.

² Young believed that Savoie changed clothes. Savoie denies that she changed clothes at this time but rather says she changed much later after the consent to search form had been signed. I am satisfied that Savoie's recollection is more accurate, primarily because in Young's version she was only out of view for a minute at the most. I do not believe that Savoie had time to get fully dressed although it is possible that she changed jackets. The officers were not clear about what she was wearing and Savoie's memory on this issue appeared quite credible. In any event, Savoie did disappear from view for a minute or so and the officers did not know what she might be doing.

trying to hide things from them. The two officers then sat down at the kitchen table and spoke with Savoie.

The Government justifies its entry into the residence on the basis of exigent circumstances. The subsequent search of the premises they say was the result of the voluntary consent by Savoie. McMackin can hardly argue that Savoie's consent was not voluntarily when Savoie herself testified that she was more than willing to cooperate with the officers. Based upon my assessment of Savoie's credibility, she would have cooperated with the officers had they returned in fifteen minutes as she requested. I am satisfied that Savoie was merely picking up papers to clean off the table in anticipation of the officers' entry. There is no indication that the papers had any relevance to this case and Savoie testified that she picked them up as an automatic gesture. McMackin contends, however, that we have no way of knowing what Savoie would have done had the officers left as she requested, and his position is that their "seizure" of Savoie was made possible by their illegal entry into the residence.

McMackin argues that Savoie's consent, even if voluntarily given, was the product of an illegal seizure of her person made when the officers, without a warrant, entered the home she shared with McMackin. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, 445 U.S. 573, 590 (1980). The Government concedes this point, but maintains exigent circumstances existed in this case justifying the officers' warrantless entry into the residence.

In determining whether an exigency justifies a warrantless entry and seizure, the test is “whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.” United States v. Wilson, 36 F.3d 205, 209 (1st Cir. 1994) (quoting United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980)). Exigency determinations are generally fact-intensive and thus must be made on a case-by-case basis. See United States v. Donlin, 982 F.2d 31, 34 (1st Cir. 1992). Under First Circuit precedent, exigent circumstances have commonly included: (1) “hot pursuit” of a fleeing felon; (2) threatened destruction of evidence; (3) risk that the suspect may flee undetected; and (4) danger to the safety of the public or the police. See United States v. Tibolt, 72 F.3d 965, 969 (1st Cir. 1995). Exigency must be assessed in light of the totality of the circumstances. United States v. Veillette, 778 F.2d 899, 902 (1st Cir. 1985). Although I could find no First Circuit precedent directly on point, other circuits have held that when the police possess probable cause but instead of obtaining a warrant create exigent circumstances, the warrantless search is illegal. United States v. Santa, 236 F.3d 662, 671 (11th Cir. 2000); United States v. Munoz-Guerra, 788 F.2d 295, 298 (5th Cir. 1986); United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990).

The claimed exigent circumstance in this case, the potential destruction of evidence, was entirely of the officers’ own making. Even if the police reasonably believed that they were witnessing Savoie in the act of “destroying” evidence when they saw her picking up papers from the kitchen table, they had no right to be in the shed at that point in time. They had been asked to leave the premises. As I concluded above, they had probable cause to believe that McMackin had engaged in illegal activity surrounding the credit card. The evidence in the case was obviously document intensive

and things like receipts, bank statements, and credit card information would likely be in McMackin's residence. They had probable cause to obtain a search warrant and indeed, unbeknownst to the two officers who went to speak with Savoie, another officer had begun preparation of an affidavit in support of a warrant. Savoie need not have been "tipped off" to McMackin's apprehension prior to obtaining the warrant and the police might have followed a different course.

Of course the officers were free to choose the alternative of going to the suspect's residence and questioning the occupant about the events. Cf. United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990). Their initial entry into the shed area was arguably consensual, at least Savoie did not object to their entry. The officers did not object to her leaving their sight and going into the home to change her clothes. If there had been a genuine destruction of evidence exigency here, the officers would surely have detained Savoie in the shed, secured the premises and obtained a warrant. Instead, they allowed her to leave their presence, and when she returned to the closed kitchen door and asked them to leave the premises, they ignored her request and then, according to *their* version of events, allowed her to once more leave their line of vision, change her clothes, and return to the kitchen area. At that point they were only able to observe the kitchen area because they had refused to leave the shed when she asked them to leave and come back in fifteen minutes.

If the officers choose to conduct their investigation by going to a suspect's premises and asking for cooperation, they cannot treat the occupant's refusal to cooperate as an exigent circumstance justifying a warrantless entry. Were the police allowed to do so, the requirement of obtaining a warrant would be rendered meaningless. It is one thing

to go to a residence to investigate when probable cause is lacking. It is another thing to go to a residence when probable cause already exists to determine whether or not the occupant will voluntarily cooperate. In the letter case, the “exigent circumstance” arises entirely from circumstances created by the officer.

However, the fact that the entry into the residence was not valid does not end the inquiry, because the Government argues that Savoie validly consented to the search, notwithstanding the illegal entry. “For consent given after an illegal seizure to be valid, the Government must prove two things: that the consent is voluntary, and that the consent was not a product of the illegal seizure.” Santa, 236 F.3d at 676 (citing United States v. Robinson, 625 F.2d 1211, 1219 (5th Cir. 1980)). As to the threshold requirement of voluntariness, the Government easily has met its burden.

Savoie was advised of her rights and asked if she would sign a consent to search form. Savoie acknowledges that the officers were polite and cordial and she fully understood her rights in connection with the search. She voluntarily agreed to consent to a search of the premises. She also voluntarily produced certain pieces of jewelry from a small jar in the kitchen. After the officers entered her kitchen, Savoie never again asked them to leave nor did she indicate in any way that she did not want to fully cooperate with them. The officers were not overbearing nor were they rude. Under the test set forth in Schneekloth v. Bustamonte, 412 U.S. 218 (1973), Savoie’s consent was voluntary in that her will was not overborne in the sense of suffering a “critically impaired . . . capacity for self-determination.” Schneekloth, 412 U.S. at 225. See also, United States v. Wilkinson, 926 F.2d 22 (1st Cir. 1991)(Breyer, C.J.)(overruled on other grounds as recognized by United States v. Manning, 79 F.3d 212 (1st Cir. 1996)).

The second prong focuses on causation in the Wong Sun v. United States, 371 U.S. 471, 488 (1963) sense of “exploitation of that illegality” versus a “means sufficiently distinguishable to be purged of the primary taint.” According to the Eleventh Circuit, when a court is confronted with this sort of problem in the context of the illegal entry of a residence, it should turn to the facts of the particular case and apply the three factors set forth in Brown v. Illinois, 422 U.S. 590, 603-604 (1975) to determine whether a voluntary consent was obtained by exploitation of an illegal seizure. Santa, 236 F.3d at 677. Those three factors are (1) the temporal proximity of the seizure and the consent; (2) the presence of intervening circumstances; and (3) “particularly, the purpose and flagrancy of the official misconduct.” Id. I will follow that roadmap.

In the present case, the voluntary consent was obtained in extremely close proximity to the illegal entry and the only intervening circumstance was Detective Young’s elaborate enumeration of Savoie’s rights regarding speaking with them and refusing to consent to a search if she so chose. However, the police conduct was not a flagrant example of official misconduct. Once inside the premises they did not draw guns or threaten physical harm to Savoie. Indeed, the converse was true. Nor did they “threaten to tear the place apart.” Wilkinson, 926 F.2d at 25. McMackin argues that but for the illegal entry, Savoie’s consent would never have been obtained. I recognize that the Wong Sun test regarding purging the primary taint requires something more than mere speculation about what Savoie might have done in the absence of an illegal entry. However, in the present case all of the evidence, including Savoie’s own testimony, points to the fact that her voluntary consent was not the product of the illegal entry. She did not just throw up her hands and conclude that the officers would not leave her

premises no matter what she asked of them. She simply determined that she wanted to cooperate with the officers. Indeed she made that determination when first confronted by them. I am satisfied from her testimony that she asked them to leave solely because she wanted to change her clothes. She had every right to do so and they had no right to remain in the shed or to enter her kitchen. On the other hand, she did not consent to the search because of their illegal entry.³ I am satisfied that neither Barbara Savoie's testimony nor the tangible evidence she turned over to the police should be suppressed.

3. Statements elicited from McMackin after his initial court appearance

The facts surrounding this portion of the investigation are also largely undisputed. McMackin was taken into custody on March 11, 2002. Formal charges were initiated and counsel was specially appointed for the limited purpose of providing representation to McMackin at a bail hearing on the morning of March 14, 2002. At that bail hearing McMackin filled out a form requesting that a lawyer be assigned to represent him on this case. He submitted that form to the court. Later that same day the investigating officers checked with the clerk of court and learned that defense counsel had not yet been assigned to represent McMackin on the underlying case. They then went to the county jail to speak with McMackin.

They presented McMackin with a consent to search form seeking his permission to search a post office box at the Kenduskeag, Maine, post office. McMackin signed the form giving his consent to the search. He also made some further admissions regarding

³ Because I am satisfied as an evidentiary matter that Savoie made the decision to cooperate before the illegal entry ever took place, I find that the Government has satisfied its burden under the Eleventh Circuit's formula. I have, therefore, no reason to consider whether Savoie's testimony and the tangible evidence she turned over to the police would be admissible at trial under the "inevitable discovery" doctrine of United States v. Procopio, 88 F.3d 21, 28 (1st Cir. 1996). However, it appears that such an analysis is another way of reaching the same result.

his role in the credit card misuse. As a result of the search of the post office box the officers did not recover any tangible evidence, so McMackin's motion is directed entirely at statements he made to the officers while executing the consent to search form. There was no discussion of McMackin's right to counsel during this exchange.

The Government does not present any evidence that the defendant waived his Sixth Amendment right to counsel. Instead it relies entirely upon the fact that three days earlier McMackin had been advised of his Miranda rights and had voluntarily waived his Fifth Amendment right to counsel. The Government argues that McMackin's conduct in signing the consent to search form was consistent with the prior waiver. The problem presented here, however, is whether McMackin's Sixth Amendment right to counsel had attached and if so, whether McMackin waived that right, not whether three days earlier he had waived his Fifth Amendment right to remain silent.

The right to counsel, which is offense specific, attaches at the time of the first formal court appearance signifying the initiation of adversarial judicial proceedings. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972). The Government suggests that even though McMackin asserted his right to counsel by filing a written request to have counsel assigned, the right had not yet attached because the court had not yet assigned an attorney. They cite no cases in support of this proposition nor can I locate any such law. But see, Michigan v. Jackson, 475 U.S. 631, 636 (1986) ("We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."); Maine v. Moulton, 474 U.S. 159, 176 (1985) (stating that the Sixth Amendment, at least after the initiation of formal charges,

guarantees the accused the right to rely on counsel and “...this guarantee includes the State’s affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.”). McMackin’s Sixth Amendment right to counsel had attached by the time the officers went to see him in his jail cell following his arraignment.

Precedent in this circuit is clear. Once the right to counsel attaches, police may not question a defendant unless counsel is present, or the defendant validly waives counsel. United States v. Leon-Delfis, 203 F.3d 103, 110-111 (1st Cir. 2000). The Government’s burden to prove relinquishment of this right to counsel remains a heavy one.

The government has the burden to prove an intentional relinquishment or abandonment of the Sixth Amendment right to counsel. . . The Court has stated that we should indulge every reasonable presumption against waiver of fundamental constitutional rights. Doubts must be resolved in favor of protecting the constitutional claim. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Id. at 110 (internal quotations and citations omitted).

In this case the Government has completely failed to meet that burden. It is undisputed that the topic of counsel was never discussed during the jailhouse interview. It is therefore impossible to find that McMackin made a valid waiver of that right. He had been told by the court he had a right to a lawyer, he then requested a lawyer, and all he got was a consent to search form presented to him by two police officers. It would be impossible to find a waiver of the right to counsel in those circumstances. The incriminating statements made by McMackin after his initial court appearance must be suppressed.

Conclusion

Based upon the foregoing, I now recommend that the court **DENY** the motion to suppress the statements made by McMackin at the time of his initial detention, **DENY** the motion to suppress the tangible evidence seized from his residence and the testimony of Barbara Savoie, and **GRANT** the motion to suppress McMackin's March 14 statements to the officers.

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, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

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.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated August 20, 2002

CJACNS

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 02-CR-32-ALL

USA v. MCMACKIN
05/07/02
Other Dkt # 1:02-m -00021
Case Assigned to: Judge GEORGE Z. SINGAL

Filed:

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Pending Counts: Disposition

18:1028B.F FRAUD WITHIDENTIFICATION DOCUMENTS

(1)

15:1644.F CREDIT CARD FRAUD

(2 - 3)

Offense Level (opening): 4

Terminated Counts: NONE

Complaints

Disposition

Ct. I - Identity Theft; Ct. II and III Interstate use of
stolen credit card [1:02-m -21]

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