

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 91-00020 P</b>
	)	
<b>JAMES E. JONES,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

On April 10, 1991 the grand jury handed down an indictment charging the defendant with knowingly possessing a firearm -- namely, a Colt AR-15 rifle, model SP-1, .223 caliber, serial number SP165643 -- not registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. ' ' 5841, 5845(a)(6), 5861(d) and 5871. The defendant filed a motion to suppress evidence seized from his home on October 29, 1990. An evidentiary hearing was held before me on June 21, 1991. The last of the supplemental legal memoranda was filed on August 6, 1991. I now recommend that the following findings of fact be adopted and that the motion to suppress be denied.

**I. PROPOSED FINDINGS OF FACT**

Defendant James E. Jones accidentally shot and wounded his 10-year-old son in the kitchen of their Westbrook, Maine home on Friday, October 26, 1990. The Westbrook Police Department and

the Maine State Police jointly investigated the shooting that evening. During a routine protective sweep of the premises Westbrook police entered a den in which they noticed a gun case housing a collection -- or, as one put it, an ``arsenal" -- of approximately 20 guns. In the kitchen police discovered a bullet hole that they linked to the accidental shooting; they were unable to recover the bullet. Jones was interviewed at the Westbrook police station that night. A police officer sought and obtained Jones' consent to search the house, which Jones withdrew 10 minutes later. Over the weekend Jones phoned Westbrook police to inform them that the bullet hole in the kitchen had been there for 10 years and was unconnected to the accidental shooting. Westbrook Police Detective John Chase tracked the defendant down at the hospital in which his son was recuperating on Monday, October 29 to ask permission to visit him at home that evening. Chase advised Jones that he wished to reenact the shooting, do a crime-scene sketch and conduct an interview, for which purpose he requested Jones be clear-headed and sober. Jones agreed to the meeting. Chase, accompanied by his supervisor, Sergeant Steven T. Lyons, and officer Michael Brown, an evidence technician for the Westbrook Police Department, arrived at the Jones residence at about 7 p.m. Brown was in uniform; Chase and Lyons were plainclothed. Lyons was concerned that some of the weapons in the defendant's collection were automatic, possibly in violation of federal law. Police had observed an Uzi and an AR-15 among the guns in the collection -- models that Lyons knew often are converted into fully automatic weapons. After a brief initial conversation during which Chase satisfied himself that Jones was sober, the officers began looking in the breezeway adjacent to the kitchen for the discharged bullet. Karen Jones, the defendant's daughter, made coffee for her father and the officers. The officers quickly remembered that they needed a consent to search and advised Jones that he would have to sign the consent form before they could continue the search for the bullet. Chase filled out the consent-to-search form, writing in the word "residence," noting the time (7:10 p.m.) and signing as a witness. Lyons or Chase

read the form out loud to Jones.<sup>1</sup> Jones signed it, asking no questions. Brown and Lyons resumed the search for the bullet and recovered it. Brown then began his crime-scene sketch while Chase had Jones reenact the shooting incident, moving from the bedroom down the hallway into the kitchen where the shooting had occurred. Lyons accompanied Chase and Jones, snapping Polaroid photographs of the reenactment. At no time during the reenactment, which lasted about 20 minutes, did Jones, Chase or Lyons enter the den. Brown's measurement sketches of the crime scene encompassed only the kitchen, breezeway and exterior of the house. Upon completing the reenactment, Chase asked Jones to meet him at the police station for a videotaped interview, indicating that the officers were wrapping things up for the night. The police informed Jones that he could ride with Karen or leave her at home; Jones chose to ride with Karen in their own car. Chase left at about the same time as Jones and Karen. Lyons and Brown remained behind, during which time Lyons viewed and photographed the weapons in the den and phoned an agent of the Bureau of Alcohol, Tobacco and Firearms ("ATF") for assistance in determining whether the weapons were illegal. About an hour and a half later Jones and his daughter returned home, surprised to see the officers' car still parked in the driveway. When they tried to reenter the house, Brown attempted to stall them, putting his hand on the door. Karen squeezed past Brown to answer a ringing phone and the defendant followed. The defendant found Lyons in his den and asked what he was doing there, given what he understood to be the limited scope of the search. Lyons expressed his suspicion that some of the weapons might be illegal, reminded Jones of his written consent to search the whole residence and informed him of his *Miranda* rights. Jones admitted that he did not then affirmatively withdraw his consent but thought he had made clear that consent was lacking. In response to Lyons' questions,

---

<sup>1</sup> Karen Jones testified that Chase read the form out loud and asked her father to read it aloud. Lyons testified that the form was read to Jones but did not indicate who read it; Chase testified that

Jones produced from a drawer a "sear," which he explained could be used to make the AR-15 fully automatic. Brown and Lyons seized the sear and at least two weapons and held them on the porch until an ATF agent arrived.

## II. LEGAL DISCUSSION

A warrantless search of a residence, such as that conducted of Jones' home by the Westbrook police, is constitutionally permissible if justified by an exception to the need for a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, *reh'g denied*, 404 U.S. 874 (1971) (citation omitted). The government bears the burden of proving that such exceptions apply. *See, e.g., id.* The government herein contends that Jones' valid consent justified the search in which the weapons and sear were seized. The defendant, on the other hand, asserts two possible bases for unreasonable search in violation of the Fourth Amendment: (1) that his consent to search was involuntary and thus ineffective, and (2) that the search of the den exceeded the scope of his consent. The defendant finally argues that, even if his consent was valid, the actual seizure of the weapons was unconstitutional because accomplished in the absence of either a warrant or exigent circumstances.

### A. Voluntariness of Consent to Search

A court must assess "the totality of all the surrounding circumstances" in determining the voluntariness of consent to search. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The prosecutor bears the burden of proving such consent was freely and voluntarily given. *See, e.g., id.* at 222. Consent is invalid only if involuntary; the government need not prove knowing, intelligent

---

Lyons read the form to Jones.

waiver of Fourth Amendment rights. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 559, *reh'g denied*, 448 U.S. 908 (1980) (question not whether defendant acted in self-interest but whether acted voluntarily); *Schneckloth*, 412 U.S. at 241. A defendant's consent to search is not coerced when there is "no overt act or threat of force against [the defendant] proved or claimed . . . [or] promises made to him . . . [or] indication of more subtle forms of coercion that might flaw his judgment." *United States v. Watson*, 423 U.S. 411, 424, *reh'g denied*, 424 U.S. 979 (1976).

Courts weigh a number of factors in assessing the voluntariness of consent, among them the defendant's age, maturity and mental capacity, "the consenting party's knowledge of the right to refuse consent; the consenting party's possibly vulnerable subjective state; and evidence of inherently coercive tactics, either in the nature of police questioning or in the environment in which the questioning took place." *United States v. Twomey*, 884 F.2d 46, 51 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 2592 (1990) (citations omitted). *See also United States v. Wilkinson*, 926 F.2d 22, 24-25 (1st Cir.), *cert. denied*, 111 S. Ct. 2813 (1991); *United States v. Kimball*, 741 F.2d 471, 474 (1st Cir. 1984); *United States v. Tidswell*, 753 F. Supp. 1001, 1005-06 (D. Me. 1990). No one factor is dispositive. *See, e.g., Schneckloth*, 412 U.S. at 226.

Jones' consent in the instant case bears many of the customary indicia of voluntariness. Jones was well aware of his right to refuse consent, as evidenced by a prior revocation of consent shortly before the evening in question and by testimony of police and his daughter, which I find credible, that he was read the written consent before signing it. During testimony before me in the evidentiary hearing Jones was articulate and appeared mentally sound. He is neither young nor feeble. He was not intoxicated on the evening of October 29. Jones had been cooperating in the investigation of the shooting, to the point of volunteering information to the police about their misapprehension as to the bullet's path. He was not caught off guard, having consented to the meeting hours earlier. He was not

under arrest or under custodial interrogation but rather in the familiar surroundings of his own home. Since the shooting he had become acquainted with at least two of the three officers, only one of whom was in uniform at the time of the consent.

The police emphasized their purpose in searching for the bullet and sketching the crime scene, very possibly confusing Jones as to the extent of the contemplated search. Nonetheless, the police could reasonably have believed that they had obtained a valid, affirmative consent to search the entire residence. *See Florida v. Jimeno*, 111 S. Ct. 1801, 1803-04 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?") (citations omitted). The language of the consent form was clear; Jones was read the form; Jones never affirmatively limited the scope of the officers' search before departing for the police station; and the officers do not appear to have engaged in a deliberate game of trickery as to their purpose, given Jones' opportunity to read the form and their willingness to have Karen remain behind when Jones went to the police station for a videotaped interview.

### **B. Scope of Consent to Search**

Even if consent is voluntary, search may not exceed the scope of the permission given. *See, e.g., United States v. Ware*, 890 F.2d 1008, 1011 (8th Cir. 1989); *United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir.), *cert. denied*, 474 U.S. 845 (1985). Jones asserts that he consented only to a search for the missing bullet, which he understood would be confined to the kitchen, breezeway and possibly the upstairs of his home.<sup>2</sup> For the reasons stated above, I find that Jones did

---

<sup>2</sup> He also consented to a crime-scene sketch, a reenactment and a videotaped interview, none of which contemplates a search for evidence.

not limit the scope of the search. He signed a consent form that indicated the scope was the entire residence," never expressing concerns or limitations until he returned to find Lyons in his den. *See, e.g., Milian-Rodriguez*, 759 F.2d at 1563 (search permissible in part because consent form general and unaccompanied by discussion of limits of search); *United States v. Suarez*, 694 F. Supp. 926, 939-41 (S.D. Ga. 1988), *aff'd*, 885 F.2d 1574 (11th Cir. 1989) (inappropriate to rely on written consent form when little of it translated in Spanish to defendant; however, oral representations indicated voluntary consent to scope of search). While Jones may have misunderstood the intentions of the police, the scope of the search to which he consented was clear and unambiguous. His actions shortly after discovering Lyons in the den further bespeak assent to the search and its scope; he produced the search from a drawer and explained its ability to fully automate weapons.

### C. Validity of Seizure

Jones having consented to the search, I must assess the validity of the seizure. Jones correctly observes that seizure is subject to a different analysis than search. *See* Defendant's Final Argument in Motion to Suppress ("Defendant's Memorandum") at 11-12. Jones contends, and the government apparently does not deny, that police lacked probable cause to seize the items when segregating them on the porch in anticipation of the ATF agent's arrival. *See id.*; Government's Second Supplemental Memorandum to Defendant's Motion to Suppress.<sup>3</sup> Nonetheless, I am persuaded that this particular seizure constituted a permissible temporary detention for investigatory purposes. *See, e.g., United States v. Place*, 462 U.S. 696, 702 (1983); *United States v. LaFrance*, 879 F.2d 1, 7-10 (1st Cir. 1989); 2 W. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* 4.11(c) at 347-48 (2d ed.

---

<sup>3</sup> The government apparently does not rely on consent to seizure expressed in the written consent form Jones signed.

1987) (hereinafter "LaFave"). The police acted diligently in summoning ATF to confirm or deny a reasonable suspicion that at least one of the weapons was illegally fully automatic. *See, e.g., United States v. Sharpe*, 470 U.S. 675, 685-86 (1985); 3 LaFave ' 9.6(e) at 594. No liberty interest of the defendant was implicated; although some items were held on his porch, he was free to come and go. *See, e.g., LaFrance*, 879 F.2d at 8. ATF's conclusions supplied probable cause to seize the items as evidence. The defendant argues that, even assuming the existence of probable cause, the police were required to obtain a warrant given the lack of exigent circumstances. *See* Defendant's Memorandum at 12. Probable cause does, however, generally suffice to deprive a suspect of a possessory interest in his property even in the absence of a warrant or exigent circumstances. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 326-28 (1987); 2 LaFave ' 4.1(a) at 121.

### III. CONCLUSION

The government having carried its burden that the defendant voluntarily consented to the search of his den and that the items were legally seized, I recommend that the above findings of fact be adopted and that the defendant's motion to suppress be **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, within ten (10) days after 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.*

*Dated at Portland, Maine this 12th day of August, 1991.*

---

*David M. Cohen  
United States Magistrate Judge*