

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

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b>Criminal No. 98-43-P-H</b>
	)	
<b>ROBERT L. DODGE,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

Robert L. Dodge, charged with the manufacture of marijuana in violation of 21 U.S.C. § 841(a)(1), seeks the suppression of evidence discovered by Buxton, Maine, police officers in his basement on May 1, 1998. Motion to Suppress and Incorporated Memorandum of Law (“Motion”) (Docket No. 4). An evidentiary hearing was held on November 2, 1998 at which the defendant appeared with counsel. At the hearing, defense counsel clarified that the scope of this motion is limited to the lawfulness of the police officers’ initial entry into Dodge’s residence. To the extent the initial entry was lawful, he observed, there is no issue regarding the seizure of the evidence at issue, which he acknowledged was in the officers’ plain view. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

**I. Proposed Findings of Fact**

Loren D. Conger, a police officer for the town of Buxton, Maine, reported for duty directing traffic on Hurlin Smith Road in Buxton at 5 p.m. on May 1, 1998. Buxton police had been directing

traffic on the road since early that morning as part of their efforts to assist the Maine State Police in a homicide investigation. The State Police had parked a mobile laboratory near the crime site in such a manner that it was blocking part of the travel lane on Hurlin Smith Road. The Buxton officers thus were directing traffic around the vehicle.<sup>1</sup>

At approximately 5:10 p.m., the driver of a small blue car that Conger had motioned to proceed past the mobile laboratory stopped in front of him. The driver, a woman who appeared to be in her thirties and was alone in the car, told Conger that she was very concerned because she had stopped to visit a friend (whom she called “June”), unexpectedly found no one at home, and noticed when she went to the back door to leave a note that a rear window was open and a towel was placed on the windowsill. The woman said that she had departed without going inside the home herself. She did not indicate that she had seen anyone or heard anything suspicious. She informed Conger, however, that she felt it should be checked out and that something seemed wrong. While talking, she appeared to be extremely nervous, continuously looking over her shoulder in the direction of the friend’s house. She directed Conger to the fourth or fifth home down Hurlin Smith Road (about one hundred yards away), which she described as a white home with a dog tied up in the yard. Conger advised the woman that he would have the home checked out, and she drove away. He did not learn her name or anything more about the nature of her relationship with the occupants of the home.

Conger radioed the Buxton police station, reaching Chief of Police Jody L. Thomas at approximately 5:12 p.m., to report a possible burglary. Thomas drove to the mobile laboratory scene, where Conger filled her in on the details of the motorist’s statement. She then drove the short

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<sup>1</sup>The murder suspect had been arrested the previous midnight, and there were no other suspects.

distance to the home. The weather was clear, and it still was daylight. The house stood on a corner lot in a residential neighborhood and was, in that sense, “exposed” to view. Walking the perimeter of the house, Thomas noticed that the front door was open approximately five to seven inches, covered by a screen door that was not securely fastened. A curtain in the front window was pulled down awry, at an odd angle. In the backyard, she observed that a rear window had been opened, a towel had been placed on the windowsill and a picnic table was positioned underneath the open window. Thomas had previously seen towels placed in windowsills at burglary sites. She could see through the window that some kitchen cupboards were open.<sup>2</sup> In her opinion, the setup of the open window, towel and picnic table was not consistent with passing food out from the kitchen, although that was possible. Some woods abutted the backyard of the house. Thomas’s concerns were heightened because of the homicide just down the street. She radioed Conger to respond, which he immediately did.

When Conger arrived, Thomas reported that something seemed wrong at the house and that they would have to enter to make sure there were no suspects or victims inside. She knocked and announced: “Police — is anyone home?” Receiving no response, she and Conger entered. At the time they entered, neither Thomas nor Conger knew who resided in the home or harbored any suspicions that anyone living at the home was engaged in an illegal activity. They entered the home solely to ensure that no intruder was hiding inside and that its occupants were safe.

Upon entering the home, the officers again announced their presence and, again receiving no response, commenced “clearing” the house by engaging in a room-by-room check for suspects or

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<sup>2</sup>Photographs admitted into evidence without objection as Government Exhs. 1 and 2 depict the front and back of the house as it appeared to the Buxton police officers on the early evening of May 1, 1998.

victims. They were joined in the midst of this process by a third Buxton police officer, Douglas Morin. The officers did not draw their weapons while searching the home. Apart from the observations that Thomas had made when walking the perimeter of the ranch-style house, the officers noticed nothing unusual on the ground floor. After checking the ground-floor rooms, Conger opened a door leading down to the basement and went down the stairs. The basement was partly open and partly walled off, with a sheet hanging over the entrance to the walled-off portion. Conger examined the open portion of the basement and then entered the walled-off portion through the sheet. As he did so, he noticed an odor of marijuana. The walled-off portion was divided into thirds. One door covered a dark room and another a lighted room. After checking the dark room, Conger opened the closed door to the lighted room. He immediately saw plants, a table and light that he recognized as marijuana plants and associated paraphernalia. He called out to Thomas, and both Thomas and Morin joined him in the basement, where Thomas viewed the contents of the lighted room. Inasmuch as they had completed their sweep of the house, the three officers thereupon promptly exited the house and went to their cruisers in the driveway. Their search, which took approximately one-half hour, had disclosed the presence of neither a victim nor a suspect. Thomas made calls from her cruiser to alert the Maine Drug Enforcement Agency to the discovery of the marijuana plants. They waited outside until drug agents arrived approximately one hour later. The house turned out to be the home of the defendant, Robert L. Dodge, and his companion, June Wear.

## **II. Discussion**

As Dodge's counsel conceded during the evidentiary hearing, the outcome of his motion to suppress hinges on whether the Buxton police lawfully entered his residence without a search warrant on the evening of May 1, 1998. Even if the initial entry into the home was justifiable, Dodge

argues, the police exceeded permissible bounds once inside. Motion ¶ 19. The police, he suggests, should have discerned upon entering that no exigency existed — at least none that justified opening a closed door, as to which a resident’s expectation of privacy is heightened. *Id.*

In the absence of either consent or a search warrant, a police officer generally may enter a private residence only with probable cause and under exigent circumstances. *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995). Probable cause exists “if the officers at the scene collectively possessed reasonably trustworthy information sufficient to warrant a prudent policeman in believing that a criminal offense had been or was being committed.” *Id.* (citations omitted). Circumstances are considered exigent “where law enforcement officers confront ‘a compelling necessity for immediate action that w[ould] not brook the delay of obtaining a warrant.’” *Id.* (citations omitted) (addition in original).

Under all of the circumstances known to the Buxton police on the evening in question, I find the search to have comported with the dictates of the Fourth Amendment. Even setting aside the disturbing coincidence that the body of a murder victim had been discovered in the neighborhood the previous day, the Buxton police had probable cause to believe a crime had been or was being committed. A woman identifying herself as a friend of the occupants had expressed great concern that something was awry at the home, imploring the police to check things out. Thomas’s initial search of the home’s exterior corroborated the witness’s observations. Thomas knew from experience that towels were used on windowsills to facilitate burglaries. The strategic placement of the picnic table beneath the open rear window bolstered her suspicion that a crime had taken or might be taking place.

As Thomas stood outside the home, she could have no way of knowing whether a burglary

had been carried out or was under way or, indeed, whether one or more occupants of the home was then endangered. Any of these scenarios could have been possible even though (i) it was broad daylight, (ii) the house was “exposed” in the sense that it stood on a corner lot, (iii) Thomas heard no suspicious noises and saw no movement in the house, and (iv) the police had been directing traffic for hours only a short distance away. Put simply, the presence of an open door and askew drapery in the front of the house, coupled with the indicia of a burglary in the back, outweighed whatever other peripheral factors might have tended to counsel that all was well at the Dodge home. The Buxton police could rule out the possibility of immediate danger to the residents’ property and persons only by checking through the inside of the home. This was accomplished with appropriate speed and restraint. There is no evidence that any property was disturbed or belongings were rummaged as police systematically swept through each room in the house. To leave a shut door closed, under the circumstances, would have undermined the very purpose of the entry; a perpetrator or victim, were any to be found, could well have been secreted within.

The First Circuit has, under similar circumstances, upheld admission of evidence discovered upon a warrantless entry and protective sweep of the wrong house in a suspected burglary. *Tibolt*, 72 F.3d at 967, 970-71. Indeed, in *Tibolt* there were even fewer indicia of an emergency than in the instant case inasmuch as the only arguable exterior sign of a burglar’s entry (apart from the sounding of a burglar alarm) was the fact that a rear door was unlocked. *Id.* at 967.

The case upon which Dodge relies, *United States v. Selberg*, 630 F.2d 1292 (8th Cir. 1980), is distinguishable. Selberg asked his neighbor, Lynch, to keep an eye on his home while he was away. *Id.* at 1293. Lynch observed that Selberg left his front door open when he departed. *Id.* at 1294. Concerned that the house could have been a target for burglars, Lynch called the police to

check it out. *Id.* Lynch had not, however, noticed anything suspicious. *Id.* The court ruled that, under the circumstances, there was neither an exigency nor probable cause to believe a crime had been committed. *Id.* at 1296. The police hence were not justified in opening a closed bedroom door behind which incriminating evidence (a weapon) was discovered. *Id.* In the instant case, the informant disclosed more than a generalized fear that the house was not properly secured. She reported concrete evidence from which it could be inferred that a burglary had been or was taking place.

### **III. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion to suppress evidence 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 this 3rd day of November, 1998.*

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*David M. Cohen  
United States Magistrate Judge*