IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 03-102 JJF
	:	
KEVIN GAINES,	:	
	:	
Defendant.	:	

Colm F. Connolly, Esquire, United States Attorney, and Ferris W. Wharton, Esquire, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF DELAWARE, Wilmington, Delaware.
Attorneys for Plaintiff.

Christopher S. Koyste, Esquire, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, DISTRICT OF DELAWARE, Wilmington, Delaware.
Attorney for Defendant.

MEMORANDUM OPINION

November 15, 2004
Wilmington, Delaware

Farnan, District Judge.

Presently before the Court are the Motion To Suppress Statements (D.I. 12-1) and the Motion To Suppress Evidence Resulting From The Seizure Of Mr. Gaines And The Search Of His Residence (D.I. 12-5) filed by Defendant. For the reasons set forth below, Defendant's Motions will be granted.

BACKGROUND

Defendant Kevin Gaines was indicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and one count of possession of an unregistered firearm, in violation of 26 U.S.C. § 5861(d). On January 16, 2004, Mr. Gaines moved, pursuant to the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, to suppress any evidence directly or indirectly derived from the search of 1509 West 3rd Street, Wilmington, Delaware, on October 16, 2003.

By his motions, Mr. Gaines contends that the first entry into his residence by Wilmington police officers was unconstitutional, and that it tainted the subsequent search of his residence. Accordingly, Mr. Gaines moves to suppress both the evidence seized during the search of his residence and the statements obtained from him after the evidence seizure.

The Court held a hearing on the Motions to Suppress (D.I. 12), and the parties submitted letter memoranda after the hearing

setting forth their positions on the evidence. Four officers testified at the hearing: Probation Officer William DuPont ("Officer DuPont"), Probation Officer Richard Negley ("Officer Negley"), Wilmington Police Officer Michael Duckett ("Officer Duckett"), and Wilmington Police Officer Richard Amsel ("Officer Amsel"). This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

1. On October 16, 2003, at approximately 5:45 p.m., WILCOM, the Wilmington Police communication center, broadcast a report that a black male wearing a white shirt was seen carrying a shotgun in the 1500 block of West 3rd Street in Wilmington. (Tr. at 4-5.)[1]

2. Police Officer Amsel ("Officer Amsel") of the Wilmington Police Department arrived on the scene and saw a man fitting the broadcast description standing on the porch of 1509 West Third Street. Officer Amsel asked the individual, later identified as Mr. Gaines, to come down from the porch and stand near Officer Amsel's police car. Mr. Gaines complied. (Tr. at 71.)

3. At that point, Officer Amsel, out of concern for his own

[1] Transcript of the February 19, 2004, Suppression Hearing (D.I. 15). Unless otherwise noted, transcript citations at the end of a numbered paragraph are for the entire numbered paragraph.

safety, conducted a pat-down search of Mr. Gaines to ensure that had no weapons on his person. (Tr. at 71.)

4. Officers Reed and Martinez of the Wilmington Police Department then arrived on the scene, and Officers Duckett, DuPont, and Negley arrived shortly thereafter. (Tr. at 74.) Officers Duckett, DuPont, and Negley saw Officers Amsel and Reed speaking with Mr. Gaines. (Tr. at 5, 26-27, 45.)

5. Mr. Gaines exhibited a calm demeanor, was cooperative, and the tone of his conversation with Officers Amsel and Reed was casual. (Tr. at 45, 72-73).

6. Before Mr. Gaines gave his consent to a search of the residence, Officer Martinez entered Mr. Gaines's residence. Officers Negley and Duckett followed Officer Martinez into the residence, while Officer Dupont waited at the front door. (Tr. at 35.) Officers Negley and Duckett entered Mr. Gaines's residence about 10 to 15 seconds after Officer Martinez entered it and remained inside the house for approximately 30 seconds. (Tr. at 36, 54.)

7. Officer Martinez went at least as far as the kitchen before Officer Negley signaled to Officer Martinez to return to the front of the house. (Tr at 29, 55-56.)

8. Upon the Officers' exit from Mr. Gaines's residence, Officer Amsel told the Officers that Mr. Gaines had consented to a search of his residence. (Tr. at 8, 29, 46.) Officers Negley,

Duckett, and DuPont then reentered Mr. Gaines's residence to search it.

9. Upon entering the kitchen of the residence, Officer DuPont saw a freezer door ajar, and a black strap hanging from the freezer door. Officer Dupont opened the freezer door and discovered a black duffel bag. Inside the bag was a sawed-off twelve-gauge shotgun. (Tr. at 9.)

10. The police officers then placed Mr. Gaines in custody. (Tr. at 10, 48.)

11. After taking Mr. Gaines into custody, the Officers took him to the Wilmington Police Station where Officer Duckett advised Mr. Gaines of his Miranda rights. (Tr. at 48-49.) Mr. Gaines responded that he understood his rights and agreed to make a statement. (Tr. at 50.) In his statement, Mr. Gaines admitted that he owned the shotgun found in the freezer. (Tr. at 51.)

CONCLUSIONS OF LAW

I. Whether The First Entry Into Mr. Gaines's Residence By The Officers Was Unconstitutional

1. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV.

2. A defendant who files a motion to suppress ordinarily

carries the burden of proof. Rakas v. Illinois, 439 U.S. 128, 130 n. 1 (1978). However, where a search is conducted without a warrant, as is the case here, the burden shifts to the Government to demonstrate by a preponderance of the evidence that the warrantless search was conducted pursuant to one of the exceptions to the warrant requirement. See United States v. Herrold, 962 F.2d 1131, 1137 (3d Cir. 1992).

3. The United States Supreme Court has held that the Fourth Amendment permits a "limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 U.S. 325, 337 (1990). A protective sweep may be conducted as a "precautionary matter and without probable cause or reasonable suspicion," and entails "spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Id. at 334. Such a warrantless search is justified because the interest of the arresting officers in taking reasonable steps to ensure their safety while making an arrest outweighs the intrusion such procedures may entail. Id.

4. Some courts have, in the wake of Buie, approved of protective sweeps which were not conducted incident to an arrest. See, e.g., United States v. Patrick, 959 F.2d 991 (D.C. Cir.

1992), United States v. Taylor, 248 F.3d 506 (6th Cir. 2001); see also United States v. Koubriti, 199 F.Supp.2d 656, 662-65 (E.D. Mich. 2002). Other courts have refused to extend Buie beyond circumstances in which an arrest is about to be made. See, e.g., United States v. Reid, 226 F.3d 1020 (9th Cir. 2000), United States v. Wilson, 36 F.3d 1298 (5th Cir. 1994). The Third Circuit has not yet considered whether law enforcement officers may conduct a protective sweep that is not incident to an arrest.

5. In analyzing the first entry into Mr. Gaines's residence by Officers Rodrigez, Duckett, DuPont, and Negley, the Court must determine whether the Officers were properly conducting a protective sweep of the premises.[2] After considering the record evidence, the Court concludes that the facts available to the Officers at the time of the first entry into Mr. Gaines's residence were insufficient to justify a protective sweep. At the time the Officers first entered Mr. Gaines's residence, Mr. Gaines was not being arrested. The complaint they were responding to was anonymous and uncorraborated. See Florida v. J.L., 529 U.S. 266 (2000) (holding that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or verity.")(internal quotations omitted). Mr. Gaines exhibited a

[2] In its post-trial submission, the Government describes the first entry by the Officers as "improper." (D.I. 18.) The Court has discussed the first entry because the circumstances of the entry are important to the decision concerning the voluntariness of Mr. Gaines's consent.

calm demeanor and the tone of the conversation between Mr. Gaines and Officers Amsel and Reed was casual. The Government contends that, because the house was dark and loud music was emanating from it, the police officers' belief that the house may contain an individual posing a danger to them was reasonable. In the Court's view, these facts do not support a reasonable belief that Mr. Gaines's residence harbored "an individual posing a danger to those on the arrest scene." Buie, 494 U.S. at 337.

In sum, the Court concludes that the first entry into Mr. Gaines's residence violated his Fourth Amendment rights.

II. Whether Mr. Gaines's Consent To The Search Of His Residence Was Tainted By The First Entry Into His Residence

6. The exclusionary rule serves to deter constitutional violations by denying the government the benefit of those violations. Segura v. United States, 468 U.S. 796, 804 (1984). Evidence derived from constitutional violations may not be used at trial because illegally derived evidence is considered "fruit of the poisonous tree." U.S. v. Pelullo, 173 F.3d 131, 136 (3d Cir. 1999); Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Courts have developed a number of exceptions to the exclusionary rule, including the independent source, inevitable discovery, and attenuation doctrines. See, e.g., Segura, 468 U.S. at 805 (independent source); Nix v. Williams, 467 U.S. 431, 441-44 (1984)(inevitable discovery); Nardone v. United States,

308 U.S. 338, 341 (attenuation). These doctrines recognize that where the causal link between the constitutional violation and later-revealed evidence is tenuous or non-existent, the later-revealed evidence can be said to be untainted by the constitutional violation and therefore may be admissible. See Pelullo, 173 F.3d at 136.

7. In the circumstances of this case, the Court concludes that the Government has not shown by a preponderance of the evidence that the causal link between the unconstitutional first entry into Mr. Gaines's residence and his consent to the search of his residence is tenuous or non-existent. The Government has not produced sufficient evidence showing that Mr. Gaines was unaware of the Officers' first entry into his residence at the time he gave his consent to the search. In the Court's view, Mr. Gaines may have consented to the search of his residence because the Officers had already been inside his residence and, therefore, refusing consent would be futile. It is the Government's burden to establish that Mr. Gaines's consent was voluntary, and it has not adduced evidence that Mr. Gaines's consent was unaffected by the four police officers arriving on the scene and entering his residence.[3] Accordingly, the Court

[3] In reaching this conclusion, the Court agrees with Mr. Gaines that the Government's burden is to adduce evidence that Mr. Gaines's consent was voluntary. In weighing the evidence adduced, the Court agrees with Mr. Gaines that the more reasonable inference, since no direct evidence exists, is that

will grant Mr. Gaines's Motion To Suppress Statements (D.I. 12-1) and Motion to Suppress Evidence Resulting From The Seizure Of Mr. Gaines And The Search Of His Residence (D.I. 12-5).

An appropriate Order will be entered.

Mr. Gaines was aware of the first entry. (D.I. 19 at 2.)

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UNITED STATES OF AMERICA,	:	
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Plaintiff,	:	
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v.	:	
	:	Criminal Action No. 03-102 JJF
KEVIN GAINES,	:	
	:	
Defendant.	:	

ORDER

At Wilmington this 15th day of November 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that the Motion To Suppress Statements (D.I. 12-1) filed by Kevin Gaines is **GRANTED** and the Motion to Suppress Evidence Resulting From The Seizure Of Mr. Gaines And The Search Of His Residence (D.I. 12-5) is **GRANTED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE