

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 Plaintiff, :
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 v. :
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ERIC J. INGRAM, :
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 Defendant. :
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Crim. Act. No. 03-109-JJF

Colm F. Connolly, Esquire, United States Attorney and Adam Safwat, Esquire, Assistant United States Attorney of the OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware. Attorney for Plaintiff.

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MEMORANDUM OPINION

December 6, 2004
Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is a Motion To Suppress Evidence (D.I. 17) filed by Defendant, Eric J. Ingram. For the reasons set forth below, the Court will deny Defendant's Motion.

BACKGROUND

I. Procedural Background

Defendant Eric J. Ingram was indicted on charges of possession with intent to distribute 50 or more grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), possession with intent to distribute 500 or more grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D), and possession of a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). Defendant moved pursuant to the Fourth, Fifth and Fourteenth Amendments of the United States Constitution to suppress evidence seized by the police at Apartment O-23, Country Club Apartments, Dover, Delaware on September 17, 2003. Although the evidence was seized pursuant to a search warrant, Defendant contends that the warrant is invalid, because it was tainted by the officers' initial illegal entry of the premises.

The Court held a hearing on Defendant's Motion To Suppress, at which time the Government presented the testimony of Detective Marvin Mailey. Defendant intended to present the testimony of

Lakisha Tolson at the hearing, but Ms. Tolson failed to appear, despite having received a subpoena. The Court continued the suppression hearing and issued a bench warrant for Ms. Tolson's arrest. However, the Court stayed execution of the warrant so as to permit Defendant the opportunity to obtain Ms. Tolson's voluntary cooperation. At the continued hearing, Ms. Tolson appeared and testified on behalf of the defense, and Agent Zon testified on behalf of the Government.

Following the hearing, the parties submitted letter memoranda pursuant to a stipulated briefing schedule. This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law regarding Defendant's Motion.

II. Factual Background

In resolving the issues presented by Defendant's Motion, the Court makes the following findings of fact based on the testimony and evidence presented at the hearing. Detective Mailey of the City of Dover Police Department suspected that Defendant and his roommate, Maurice Bell, were engaged in drug dealing activities as a result of information received by Detective Mailey from several informants. (D.I. 23 at 6:11-13, 8:15-9:3, 9:5-8). On two previous occasions, Detective Mailey had observed Defendant exiting the O-building at the Country Club Apartments in Dover, Delaware. (D.I. 23 at 7:16-24). Detective Mailey was also familiar with Defendant's appearance from other observations of

Defendant in Dover and from his picture on the Delaware Justice System computer. (D.I. 23 at 7:21-8:4, 8:7-9).

On September 17, 2003, Detective Mailey arranged a buy-bust operation with the help of a confidential informant (the "CI") who placed a call to Maurice Bell to order cocaine base and cocaine powder. (D.I. 23 at 11:14-23). As a result of this operation, Bell was arrested and cocaine base and powder were found in his vehicle. (D.I. 23 at 12:1-24).

Later the same day, a second buy-bust operation was set in motion using the same CI. This time, the CI contacted Defendant to order cocaine base, and Defendant instructed the CI to go to his apartment. (D.I. 23 at 13:8-14:17). The CI informed police that he had previously purchased cocaine from Defendant at Apartment O-23 and that Defendant drove a green, American-made car. (D.I. 23 at 15:12-15, 16:3-4). After this call, Detective Mailey contacted Detective David Boney and asked him to set up surveillance of Apartment O-23. (D.I. 23 at 16:10-25).

After Detective Boney was in position, the CI placed a second call to Defendant and asked him if he could meet him at the Route 8 Superfresh, because he was with someone. (D.I. 23 at 16:10-25). Defendant told the CI to wait for him at the Superfresh, and he would come to pick him up and bring him to the apartment. (D.I. 23 at 17:1-3).

Detective Mailey then drove with Agent Zon toward

Defendant's apartment, which was approximately 800 yards from the Superfresh. (D.I. 23 at 17:5-12, 17:17). Another officer followed. As they were driving, Detective Mailey observed a green American car driving toward the Superfresh, but noted that the man in the vehicle was not Defendant. (D.I. 23 at 17:21-25). Detective Mailey proceeded to Defendant's apartment building and parked at a building in the same complex to wait for confirmation of Defendant's arrest, whom Detective Mailey still expected to arrive at the Superfresh. (D.I. 23 at 18:10-12). Detective Mailey and Agent Zon positioned themselves so that they could see the rear of Defendant's building, approximately 30 to 40 yards away. (D.I. 23 at 18:18-19:8, 20:10-13). While waiting to hear from the officers at the Superfresh, Detective Mailey looked in the direction of Defendant's apartment and observed a man whom Detective Mailey recognized as Defendant, dumping a white powdery substance out a trash bag. (D.I. 23 at 19:8-22). Detective Mailey also saw a clump of the substance hit the ground. Although Detective Mailey acknowledged at the hearing that a field test is necessary to determine the content of the powder with certainty, Detective Mailey believed the substance was cocaine powder at the time he observed it based on its appearance and his knowledge of Defendant's history with cocaine as relayed by the informants he had spoken with in the past. (D.I. 23 at 57:20-58:5, D.I. 23 at 20:1-9).

Detective Mailey testified that although he was surprised, because he expected Defendant to be at the Superfresh, he told Agent Zon that the man on the balcony was Defendant. (D.I. 23 at 19:16-20). Detective Mailey surmised that Defendant had heard of Bell's arrest and was trying to destroy evidence. (D.I. 23 at 20:7-9).

Detective Mailey and Agent Zon ran to Defendant's apartment to place Defendant under arrest. (D.I. 23 at 55:14-24, 56:19-57:23). At the time, Detective Mailey believed that Defendant was still in the apartment and that it was likely that evidence was being destroyed. (D.I. 23 at 54:2-11, 58:18-25). Detective Mailey and Agent Zon began banging on the back door of Defendant's apartment announcing, "Dover Police, come to the door." (D.I. 23 at 20:16-24). Although there was no answer for four or five minutes, Detective Mailey heard quick movement, "like somebody running around in the residence." (D.I. 23 at 20:17-21:1, D.I. 25 at B-15:12-21). Eventually, the door was opened by Lakisha Tolson, Defendant's girlfriend. (D.I. 23 at 21:3-6, D.I. 25 at B-4:14-18). Ms. Tolson was wearing a nightgown with a pair of jeans underneath it. (D.I. 25 at B-11:17-20). At the time, Ms. Tolson was not known by either Detective Mailey or Agent Zon. (D.I. 23 at 21:9)

While showing his badge, Detective Mailey identified himself as a police officer and asked the whereabouts of Eric Ingram.

(D.I. 23 at 21:20-21). Agent Zon was behind Detective Mailey, and Agent Zon had his gun drawn. (D.I. 25 at B-15:24-16:6). Detective Mailey did not have a gun drawn.

Ms. Tolson acted as if she didn't know who Eric Ingram was and Detective Mailey asked again if Eric was there. Agent Zon testified that Ms. Tolson said, "I don't know what you are talking about," but Detective Mailey testified that she was not responsive. (D.I. 23 at 21:21-24, D.I. 25 at B-16:17-19). Detective Mailey then asked her if he and Agent Zon could look for Defendant inside. Ms. Tolson said "yeah" or "uh-huh" and stepped aside to allow the officers to enter. (D.I. 23 at 21:18-25, D.I. 25 at B-16:20-23).

Once inside, Detective Mailey and Agent Zon conducted a security sweep of the apartment and a search for Defendant. Another black male, William Friends, was in the apartment and he and Ms. Tolson were detained near the door for security reasons. They were not handcuffed but were sitting down. (D.I. 25 at B17:1-18:11).

During the search and sweep, Detective Mailey and Agent Zon observed, in plain view, an ATM card with Defendant's name on it that was soiled with an off-white chunky substance; the same type of substance on the kitchen counter; a Crown Royale bag on the living room floor with cash protruding from it; an off-white substance in the sink; and an off-white substance with a fork

through it in the toilet. The officers also noticed that the stove was still warm and that a steel cooking pot which was warm to the touch was in the back bedroom. (D.I. 23 at 22:1-24:13).

As other officers arrived to secure the apartment, Detective Mailey went to obtain a search warrant. (D.I. 23 at 24:11-52). In his affidavit to obtain the warrant, Detective Mailey included the events of the day and his observations of the items in the apartment, but omitted his observation of Defendant on the balcony emptying white powder. (D.I. 23 at 25:7-11). However, Detective Mailey did include this information in his police report. (D.I. 23 at 49:10-24).

During the execution of the search, a nearby neighbor called the police and told them about a bag in his yard. The police retrieved the bag and found that it contained 800 grams of crack cocaine, 480 grams of marijuana and two digital scales. It also contained a cell phone that had the same number that the CI used to call Defendant earlier that day. (D.I. 23 at 25:19-26:5).

DISCUSSION

In response to Defendant's Motion To Suppress Evidence , the Government contends that the officers' initial entry into the apartment was lawful, because (1) the officers had valid consent to enter the apartment and search for Defendant, and (2) exigent circumstances justified the officers' entry into the apartment. The Court will examine each of the Government's arguments in

turn.

I. Whether The Officers Had Valid Consent To Search The Apartment For Defendant

The Government contends that Lakisha Tolson, Defendant's girlfriend, had common authority over the premises, and therefore, Ms. Tolson's consent to the officers' request to enter the premises was valid and voluntary. In the alternative, the Government contends that Ms. Tolson had the apparent authority to give her consent to the officers to search the premises for Defendant.

The authorities may conduct a warrantless search of property if they obtain the voluntary consent of the individual whose property is to be searched or a third party with common authority or joint control over the premises. The common authority which justifies third party consent "rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." United States v. Matlock, 415 U.S. 164, 172 n.7 (1974).

In addition, a warrantless search may be conducted if an individual with apparent authority consents to the search. Illinois v. Rodriguez, 497 U.S. 177, 179, 186 (1990). To assess whether an individual has apparent authority to consent to a

search, the court must consider whether the facts available to the authorities would create the reasonable impression that the individual giving his or her consent has some degree of control or authority over the premises. United States v. Clark, 96 Fed. Appx. 816 (3d Cir. 2004) (citing Rodriguez, 497 U.S. at 186-189). Stated another way, the court should consider whether indicia of actual authority existed at the time the officers received consent to search the premises. See United States v. Rosario, 962 F.2d 733, 737 (7th Cir. 1992) ("The question is not who comes to the door so much as it is whether whoever appears there projects an aura of authority upon which one can reasonably rely.").

Examining the circumstances of this case in light of the applicable legal principles, the Court concludes that Ms. Tolson's consent was not valid. Although Ms. Tolson was Defendant's girlfriend at the time, the Government has not demonstrated that Ms. Tolson had common authority over the premises such that she had actual authority to consent to the officers' search. Ms. Tolson was not the owner or lessee of the premises, and Ms. Tolson testified that she stayed at the apartment "off and on occasionally." Although the Government points to Ms. Tolson's testimony that Defendant left her alone in the apartment on several occasions, the Court is not persuaded that these circumstances give rise to a conclusion that Ms.

Tolson had common authority over the premises. For example, no testimony was elicited that Ms. Tolson had a key to the premises or that she had belongings at the premises such that she should be considered a co-inhabitant of the premises. While the lack of this type of evidence is not dispositive, in the Court's view, its absence weakens any suggestion that Ms. Tolson's "off and on" presence at the apartment is enough to vest her with the common authority needed to give valid consent to a search. Accordingly, the Court concludes that the Government has not established by a preponderance of the evidence that Ms. Tolson possessed common authority over the premises.

Similarly, with regard to the question of apparent authority, the Court concludes that the Government has not established by a preponderance of the evidence that Ms. Tolson had apparent authority to give her consent. Although Ms. Tolson arrived at the door in a nightgown with jeans underneath it, the Court is not persuaded that this factor is sufficient to have given the officers the reasonable belief that Ms. Tolson had the authority to consent to a search of the premises, particularly in light of the other circumstances existing at the time. The officers were unaware of Ms. Tolson's identity and did not know that she was Defendant's girlfriend. In addition, the officers knew that Mr. Bell was the lessee of the apartment. (D.I. 23 at 42). Further, Ms. Tolson did not speak with any authority over

the premises, and her answers to the officers' questions were at best confused, and at worst, non-existent. In these circumstances, the Court cannot conclude that Ms. Tolson had the apparent authority to consent to the officers' request to enter and search the apartment for Defendant. Accordingly, the Court concludes that the Government has not established that the officers' had a valid consent to enter the premises, and therefore, the Court declines to consider the voluntariness of Ms. Tolson's consent.

II. Whether Exigent Circumstances Justified The Officers' Entry Into The Apartment

In the alternative, the Government contends that even if the officers lacked a valid consent to enter the apartment, the officers' entry was justified under the exigent circumstances exception to the search warrant requirement. Specifically, the Government contends that the officers reasonably believed that evidence was being destroyed, and therefore, the officers were permitted to enter the apartment without obtaining a warrant.

Exigent circumstances justify a warrantless search when "government agents [] have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant . . ." United States v. Rubin, 474 F.2d 262, 268-269 (3d Cir. 1973). Circumstances relevant to

determining whether exigent circumstances exist include:

(1) the degree of urgency involved and the amount of time necessary to obtain a warrant, (2) the reasonable belief that contraband is about to be removed, (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought, (4) information indicating the possessors of the contraband are aware that the police are on their trail, and (5) the ready destructibility of the contraband and the knowledge 'that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.'

Id. at 268-269 (internal citations omitted). The Government bears the burden of proving that exigent circumstances existed at the time of the police's entry into the apartment.

Applying the Rubin analysis to the circumstances of this case, the Court concludes that the officers' initial entry into the apartment was justified by the exigent circumstances exception to the search warrant requirement. Based on his experience as a narcotics officer, his prior knowledge concerning Defendant's drug dealing activities, his personal observations and the events of the day in question, Detective Mailey had probable cause to believe that contraband was present at the premises. Two informants had given Detective Mailey information about Defendant's drug dealing activities and Detective Mailey had seen Defendant leaving the O-building of the apartment complex on at least two occasions. Detective Mailey also knew that Maurice Bell lived in the apartment, was the lessee of the apartment, and was arrested in connection with a buy-bust

operation launched in part by Detective Mailey with the help of a confidential informant. The same confidential informant told officers that he had purchased drugs from Defendant at his apartment, and this informant then contacted Defendant under Detective Mailey's direction to set up a second drug transaction. Although Detective Mailey observed Defendant's car heading toward the Superfresh, he saw that someone else was driving the vehicle. Detective Mailey went to Defendant's apartment to conduct surveillance and identified Defendant standing on the balcony of the apartment emptying what appeared to be cocaine from a bag. Based on his experience and the appearance of the substance, Detective Mailey believed the substance that was being discarded was cocaine. Given these factors, the Court concludes that Detective Mailey had probable cause to believe that Defendant was inside the apartment trying to destroy evidence.

In addition, the Court concludes that the facts and circumstances relevant to establishing exigent circumstances under Rubin are present in this case. Based on his observations of Defendant on the balcony, Detective Mailey was under a reasonable belief that evidence was being removed and/or destroyed. In light of these observations, Detective Mailey was reasonable in concluding that he did not have two or more hours to wait to secure a warrant to search the premises. Detective Mailey was also reasonable in believing that Defendant knew that

officers were on his trail, because Defendant did not go to the Superfresh as requested by the confidential informant. In these circumstances, it was also reasonable for Detective Mailey to believe that Defendant had become aware of Bell's arrest and was afraid that he was being pursued next. In addition, the type of contraband at issue in this case was readily disposable, and the officers were aware, based on their experience, that drug dealers often attempt to destroy evidence when they believe they are being pursued by the police.

Defendant contends that exigent circumstances did not exist, because the officers spent four or five minutes knocking on the door of the apartment, instead of breaking the door down. The Court is not persuaded that the officers' failure to knock the door down negates the exigent circumstances exception. Although some evidence may have been capable of being destroyed in the officers' four or five minute delay, it is likely that much more evidence would have been destroyed in the hours it takes to secure a warrant. That the officers hesitated to break down the door, and instead chose to give the occupants an opportunity to open it, does not, in the Court's view, take this case out of the exigent circumstances exception. The officers waited four or five minutes to give the occupants a chance to open the door. The Court cannot conclude that this amount of time was so unreasonable under the facts of this case so as to negate the

exigency of the circumstances faced by the officers.

Once the officers were inside the residence, they conducted a limited sweep of the premises and secured the residence so as to prevent any further destruction of evidence. Upon observing evidence in plain view, the officers then obtained a warrant to engage in a more extensive search. In these circumstances, the Court concludes that the officers acted reasonably and that their initial entry into the apartment was justified by exigent circumstances. See United States v. Robles, 37 F.3d 1260, 1264 (7th Cir. 1994).

In sum, the Court concludes that the officers' initial entry into the apartment was lawful, based on the exigent circumstances exception to the search warrant requirement. Accordingly, the evidence derived from the officers' initial entry and the subsequently obtained search warrant was not tainted by an illegal search, and therefore, the Court will deny Defendant's Motion To Suppress.

CONCLUSION

For the reasons discussed, the Court will deny Defendant's Motion To Suppress.

An appropriate Order will be entered.

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O R D E R

At Wilmington, this 6th day of December 2004, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendant's Motion To Suppress Evidence (D.I. 17) is **DENIED.**

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE