IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-00320-14-CR-W-DGK
	)	
RAFAEL ZAMORA,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT RAFAEL ZAMORA'S MOTION TO SUPPRESS

The United States of America, by Beth Phillips, United States Attorney, and the undersigned Assistant United States Attorney, both for the Western District of Missouri, respectfully submits this response to the defendant's Motion to Suppress, filed June 14, 2011.

I. FACTUAL BACKGROUND

On November 19, 2010, Drug Enforcement Administration (DEA) Special Agent (SA) Christopher M. Kline, DEA SA Tim McCue, Kansas City, Missouri, Police Department (KCMOPD) Detective Jim Swoboda, KCMOPD Detective Vern Huth, KCMOPD Police Officer Dave Barbour, KCMOPD Police Officer Curtis Copinger, and Deputy United States Marshal Brian Cutler arrived at 2908 Holly, Kansas City, Missouri to execute an arrest warrant for the defendant. (ROI ¶1.)[1] The arrest warrant was based on the federal indictment in this case returned on November 17, 2010, charging him with conspiracy distribution of 5 kilos or more of cocaine, a Schedule II controlled substance, 50 grams or more of cocaine base ("crack"), a Schedule II controlled substance, and 100 kilos or more of marijuana, a Schedule I controlled

[1] "ROI" refers to the Report of Investigation.

substance, contrary to the provisions of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A) and (B), all in violation of Title 21, United States Code, Section 846 and a money laundering conspiracy.

At approximately 6:00 a.m., the investigators knocked on the door and the defendant answered their knock. They told him they were there to arrest him on a drug warrant and asked him to step outside. He was placed under arrest without incident on the front porch of the home. While the defendant was standing on the front porch, he gave an unsolicited statement that he had some "stuff" under the basement steps, inside the residence. (ROI ¶2.) Based on past experience, the agents believed the term "stuff" to mean drugs. When the defendant told the officers they could retrieve the "stuff," SA Kline and SA McCue went to an area under the interior basement steps that resembled some type of storage area and found a white plastic grocery bag filled with a leafy green substance believed to be marijuana. The officers then left the home. (ROI ¶2.) While the officers were armed, wearing identification, and some uniformed, there was no forced entry nor were any weapons pointed at the defendant.

Detective Huth and Police Officer Barbour transported the defendant to the Kansas City, Missouri Police Department Headquarters at 1125 Locust to be interviewed. SA McCue and Deputy Cutler seized from the residence a 2005 Chevrolet Avalanche pick-up belonging to Zamora pursuant to indictment returned on November 17, 2010[2]. (ROI ¶3.)

At approximately 8:00 a.m., Detective Swoboda and SA Kline advised the defendant of his Miranda rights. The defendant stated he understood his rights and waived them by signing

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[2]This vehicle was later returned to the lien holder due to the value of the truck being less than the lien.

the Kansas City, Missouri Police Department Form-340 at approximately 8:05 a.m. (ROI ¶4.) Detective Swoboda and SA Kline questioned the defendant about his drug use and supply sources. (ROI ¶5-11.) During this interview, the defendant admitted to knowing Juan Marron, the lead defendant in the indictment. (ROI ¶12.) At 8:45 a.m., the defendant stated he did not want to cooperate with investigators any further and requested an attorney. Detective Swoboda and SA Kline immediately stopped the interview and transported the defendant to the United States Marshal Service lock-up at the Western District of Missouri Courthouse, releasing him into their custody for booking and processing. (ROI ¶13,14.)

II. ARGUMENTS AND AUTHORITIES

A. Evidence Seized At The Home

The Fourth Amendment does not forbid all searches and seizures, but only those that are unreasonable. *Elkins v. United States*, 364 U.S. 206, 222 (1960). A search is generally considered to be reasonable when there is a judicially- issued warrant based on probable cause, but it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). In order to be valid, consent to a search must be knowing and voluntary. *United States v. Sanders*, 424 F.3d 768, 773 (8th Cir. 2005) (citing *United States v. Brown*, 763 F.2d 984, 987 (8th Cir. 1985)). The issue of "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227; *Sanders*, 424 F.3d at 773. When the Government relies on the defendant's consent to justify a warrant-less search, the prosecution must prove, by a

preponderance of the evidence, that consent was freely and voluntarily given. *United States v. White*, 81 F.3d 775, 780 (8th Cir. 1996).

The defendant claims that his consent to search the limited area in his home was involuntary, so the evidence seized by the officers should be suppressed. (Doc. 251, Pg. 2). Shortly after the defendant was placed under arrest, he told the officers that he had "stuff" underneath the basement steps and that the officers could retrieve it. This admission and statement implied consent that the officers could enter the residence to retrieve the drugs. SA Kline and SA McCue had consent to enter the residence, go to the area stated by the defendant (underneath the basement steps) and seize the drugs found under the steps, performing a limited search which did not violate the defendant's Fourth Amendment rights. The defendant was present during this entry and did not refuse consent at any time, expressly or impliedly. These facts support a determination that the defendant told the officers about the drugs under the basement steps and gave them permission to enter and seize them. The defendant's statement of facts, which is not found in the police report, is where he claims, for the first time, to have been intimidated by the officers' presence and the weapons displayed, thus making his consent involuntary. The credible evidence, as found in the police report, shows that the defendant voluntarily consented to the search beneath the basement steps. The defendant does not allege that he was expressly or impliedly threatened or coerced prior to giving consent and no evidence has been presented to support such a conclusion. *See United States v. Jones*, 475 F.2d 723, 730 (5th Cir. 1973) ("[T]he absence of intimidation, threats, abuse (physical or psychological), or other coercion is a circumstance weighing in favor of upholding what appears to be voluntary consent"). The defendant does not claim that any force was threatened or applied, and he does

not assert he was actually subjected to any type of physical or mental intimidation. Rather, his claim of involuntariness stemmed solely from the officers' presence and his subjective feeling that he did not feel free to exercise his right to refuse consent, even though he was the one who volunteered he had "stuff" under the basement steps.

In addition to the absence of overt threats or intimidation, the reviewing court can also examine more subtle factors including the defendant's age, intelligence and education, whether he was intoxicated, whether *Miranda* warnings were provided prior to his consent, and whether he was aware of his legal protections under the criminal justice system. *United States v. Mancias*, 350 F.3d 800, 805 (8th Cir. 2003). Here too, the facts lack any evidence of overt threats or intimidation. Although the defendant did not receive his Miranda warnings prior to granting the officers consent to search, the absence of such warnings are not dispositive on the issue of voluntary consent. *United States v. Zapata*, 180 F.3d 1237, 1241 (11th Cir. 1999). Additionally, the defendant made the statement before being advised of his *Miranda* rights, but the requirements of *Miranda* arise only when a defendant is both in custody and being interrogated. *United States v. Head*, 407 F.3d 925, 928 (8th Cir. 2005). The defendant was in custody, but the arresting officers neither expressly asked him about the drugs, and the officers did not do or say anything they would have reasonably expected to elicit the defendant's incriminating statement. For that reason, the defendant was not under interrogation for purposes of *Miranda*, and his voluntary statement of the location of the drugs was admissible. A defendant does not have to be advised of the right to refuse consent before his consent is valid. *Schneckloth*, 412 U.S. at 227.

In addition to the voluntariness factors just discussed, *Chaidez* also instructs a reviewing court to examine several other factors in determining voluntariness. *United States v. Chaidez*, 906 F.2d 377 (8th Cir. 1990). These factors include the length of detention, the existence of threats, intimidation or promises, the defendant's custodial status, whether the consent was obtained in a public or secluded area, and whether the defendant objected to the search while it was being conducted. *Chaidez*, 906 F.2d at 381. An examination of each of these factors also supports the voluntariness of the defendant's consent.

To begin with, the defendant was detained just a few moments before he volunteered the existence of and location of the "stuff." His detention occurred outside his own house, on his own front porch, in full view of the public. He was, in fact, detained prior to his consent only long enough for the officers to conduct their investigation into the possession of illegal narcotics underneath the steps. As earlier emphasized, the defendant was never threatened or, despite his contention, intimidated. The defendant was not promised anything in exchange for his consent to search and he has not contended otherwise. Although he was in custody at the time he gave consent, this fact in and of itself is not determinative, since even persons who have been arrested and are in custody can voluntarily consent to a search. *Chaidez*, 906 F.2d at 382. See also *United States v. Watson*, 423U.S. 411, 424 (1976) ("custody alone has never been enough in itself to demonstrate a coerced . . . consent to search). The defendant, according to the officers, voluntarily consented to the search, never objected to the search, and stood by without protest while the officers searched. (ROI ¶1.)

Essentially, the defendant's claims consist of the theory that his consent to search was involuntary because he was subjectively intimidated by the officers' mere presence around his

home. This theory is at odds with the credible evidence. Since the Government clearly met its burden of establishing that the defendant's consent to search was voluntary, the district court should deny the motion to suppress the evidence found in the defendant's home.

B. Statements Made At The Home

The defendant requests suppression of the statements made to law enforcement during the defendant's arrest at his home. (Doc. 251, Pg. 1). It has been clearly established above that the defendant gave a voluntary statement and consent to search for the drugs found underneath the basement steps. However, the defendant then mentions several questions the officers asked about the location and quantity of the drugs. These questions allegedly made by the officers are not in the Report of Investigation, written on November 19, 2010, and not found in any discovery.

Even if the officers had made these statements, which is not conceded in this motion, the defendant had already given his consent to the search. Any of these alleged questions would fall under the scope of that consent. The scope of consent is measured under the Fourth Amendment using an objective reasonableness standard, which considers what an objectively reasonable person would have understood the consent to include. *United States v. Fleck*, 413 F.3d 883, 892 (8th Cir. 2005). Any questions asked about the drugs found, and the correct area to be searched, fall within the scope of the search. For these reasons, the statements the defendant made during his arrest should not be suppressed.

C. Interrogation

The defendant argues that the statements made during his November 19, 2010, interrogation with the agents at the police department should be suppressed as a deterrence to law

enforcement's prior search, to ensure the evidence at trial is voluntary, and to prohibit the Government from introducing uncorroborated confessions at trial. (Doc. 251, Pg. 2). This argument is without merit. A waiver of the Fifth Amendment privilege against self-incrimination is valid if the waiver is made voluntarily, knowingly and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *United States v. Harper*, 466 F.3d 634, 643 (8th Cir.2006) (internal quotation omitted), cert. denied, 549 U.S. ----, 127 S.Ct. 1504, 167 L.Ed.2d 242 (2007). In order to determine whether a confession was voluntary, the Court looks to the "totality of the circumstances and must determine whether the individual's will was overborne." *United States v. Castro-Higuero,* 473 F.3d 880, 886 (8th Cir.2007) (internal quotation omitted).

On the same date, approximately two hours after his arrest, the defendant was interrogated at the Kansas City, Missouri Police Department Headquarters. The defendant was read his *Miranda* rights, and he signed a *Miranda* waiver. (Form 340). The defendant has given no evidence that the Miranda waiver signed by the defendant was not knowing and voluntary, or that it was in any way coerced. Even if the Court were to suppress any prior statements at the residence made by the defendant or even the consent search at the residence, which clearly it should not, it does not require suppression of a later *Mirandized* statement made after a valid waiver. *U.S. v. Walker*, 518 F.3d 983, 985 (8th Cir. 2008). The statements obtained during the interrogation should not be suppressed.

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the defendant's Motion to Suppress.[3]

Respectfully submitted,

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By */s/ Bruce Rhoades*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on June 22, 2011, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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/s/ Bruce Rhoades

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[3] The United States gratefully acknowledges the work of Elizabeth Landau, J.D. Candidate, University of Kansas Law School, Class of 2012, Summer Law Intern, WDMO, in the preparation of this motion.