

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
) Case No. 08-00026-03/05-CR-W-FJG
)
 TROY R. SOLOMON,)
 CHRISTOPHER L. ELDER, and)
 DELMON L. JOHNSON,)
)
 Defendants.)

REPORT AND RECOMMENDATION

This matter is currently before the Court on defendant Elder’s Motion to Suppress All Evidence Seized From the South Texas Wellness Center (doc #96) and defendants Solomon’s and Johnson’s Combined Motion to Suppress All Evidence Obtained in Search of South Texas Wellness Center (doc #115). For the reasons set forth below, it is recommended that these motions be denied.

I. INTRODUCTION

On February 6, 2008, the Grand Jury returned a twenty-four count Indictment against Mary Lynn Rostie, Cynthia S. Martin, Troy R. Solomon, Christopher L. Elder and Delmon L. Johnson. Defendant Solomon is charged in Counts One through Twelve of the indictment, defendant Elder is charged in Counts One and Three through Ten and defendant Johnson is charged in Counts One, Two and Seven through Ten. Count One of the indictment charges a conspiracy to distribute controlled substances. Count Two charges a conspiracy to commit promotional/concealment money laundering. Counts Three through Twelve charge defendants with distribution of controlled substances.

On October 21, 2008, the undersigned heard argument regarding defendants' standing to raise a suppression issue with regard to a search warrant issued for the South Texas Wellness Center. Defendant Solomon was represented by retained counsel Mary Grace Ruden and Anthony L. Bannwart. Defendant Elder was represented by retained counsel John R. Osgood. Defendant Johnson was represented by retained counsel Anthony L. Bannwart. The Government was represented by Assistant United States Attorneys Rudolph R. Rhodes and J. Curt Bohling.

II. FACTS

Based on documents provided to the Court, the undersigned submits the following proposed findings of facts:

1. A Search Warrant was issued for the South Texas Wellness Center on May 2, 2006. (Motion to Suppress All Evidence Seized From the South Texas Wellness Center (doc #96) at Ex. A; Government's Consolidated Response to Defense Motions to Suppress Evidence (doc #129) at doc #129-3) The Search Warrant was issued out of the United States District Court for the Southern District of Texas and was signed by United States Magistrate Judge Calvin Botley. (Id.)
2. The Affidavit for Search Warrant provides in part:

I, Connie L. Overton, a duly sworn and authorized Investigator of the Drug Enforcement Administration, Department of Justice, Houston, Texas, hereby state as follows:

* * *

3. Based on the information set forth below, I submit that there is probable cause to believe that SOUTH TEXAS WELLNESS CENTERS and related persons and entities, including those identified in this affidavit, have been committing, and are continuing to commit, violations of 21 U.S.C. 841(a)(1), unlawful distribution of controlled substances; violations of 21 U.S.C. 846, conspiracy to unlawfully distribute controlled substances; violations of 21 U.S.C. 843(b), use of communications facilities to unlawfully distribute controlled substances; and 18 U.S.C. 1956, money laundering.

* * *

5. According to Title 21, United States Code of Federal Regulations, Section 1306.04, “A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his/her professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of Section 309 of the Controlled Substances Act (Title 21, United States Code, Section 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.”
6. In October 2005, the DEA Houston Field Division received information from the Pharmacy Board of Missouri indicating that SOUTH TEXAS WELLNESS CENTERS received controlled substances via fraudulent prescriptions. These prescriptions were authorized under the DEA registration of Dr. Peter Okose, 1006 Federal Road, Houston, Texas 77015.
7. The Pharmacy Board of Missouri reported that Rostie Enterprises, LLC., doing business under the name The Medicine Shoppe #1067, 547 N. Scott, Belton, Missouri 64012, received faxed prescriptions from Robert Kleman, office manager of Universal Medical Clinic, 1006 Federal Road, Houston, Texas 77015. Universal Medical Clinic operates under the medical supervision of Dr. Peter Okose. All of the prescriptions were written for 120 dosage units of Hydrocodone 10/650 and 120 dosage units of Carisoprodal. The Medicine Shoppe dispensed the medications as written. The prescriptions were shipped via Federal Express to SOUTH TEXAS WELLNESS CENTERS.
8. From August 19, 2004, to October 18, 2005, The Medicine Shoppe shipped approximately 295 packages to SOUTH TEXAS WELLNESS CENTERS. SOUTH TEXAS WELLNESS CENTERS is not registered with the Drug Enforcement Administration to dispense or distribute controlled substances.
9. According to Title 21, United States Code of Federal Regulations, Section 1301.11, “Every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing,

importation or exportation of any controlled substance shall obtain a registration unless exempted by law or pursuant to 1301.22 – 1301.26.”

10. Of the 295 packages, 188 packages were shipped to the attention of Troy Solomon. Solomon is also the co-owner of Ascensia Nutritional Pharmacy, which is located in the same office building as SOUTH TEXAS WELLNESS CENTERS. Lynn Rostie, Owner and Pharmacist of The Medicine Shoppe #1067 was interviewed by the Missouri Pharmacy Board Investigator. Rostie stated to the Investigator that she was approached by Solomon. Solomon presented himself as an agent of Dr. Peter Okose. Solomon told Rostie that he owned SOUTH TEXAS WELLNESS CENTERS. Solomon is not registered in the state of Texas as a physician, pharmacist, or any other type of medical professional. Moreover, Solomon is not registered with the Drug Enforcement Administration to prescribe, dispense, or distribute controlled substances.
11. Of the 295 packages, 107 packages were shipped to the attention of Dr. Chris Elder. Elder is registered with the Drug Enforcement Administration to prescribe controlled substances. Elder is not registered to dispense or distribute controlled substances from locations other than his registered location of Pinewood Medical Center, 3010 Little York Road, Houston, Texas 77093.
12. According to documentation received from Missouri Pharmacy Board, The Medicine Shoppe distributed approximately 1,291,800 dosage units of hydrocodone to SOUTH TEXAS WELLNESS CENTERS.
13. According to Title 21, United States Code of Federal Regulations, Section 1301.12 “A separate registration is required for each principal place of business or professional practice at one general physical location where controlled substances are manufactured, distributed, imported, exported, or distributed by a person.”
14. Dr. Christopher L. Elder became registered with the Drug Enforcement Administration as a practitioner on August 21, 2003. He was assigned DEA registration BE8456887. Dr. Elder’s registered location is Pinewood Medical Center, 3010 Little York Road, Houston, Texas 77093. Dr. Elder is not registered to dispense or distribute controlled substances from locations other than Pinewood Medical Center. According to the Federal Express shipping documentation, Dr. Elder received approximately 107

shipments at SOUTH TEXAS WELLNESS CENTERS from The Medicine Shoppe #1067.

(Motion to Suppress All Evidence Seized From the South Texas Wellness Center (doc #96) at Ex. B; Government's Consolidated Response to Defense Motions to Suppress Evidence (doc #129) at doc #129-3)

3. On June 13, 2007, defendant Elder provided the following Affidavit Relating to Grand Jury Subpoena for Records:

I, Christopher Elder, am a medical doctor licensed by the State of Texas. Currently, I practice medicine in the Houston, Texas, area.

1. In May 2007, I received a grand jury subpoena for medical records relating to the South Texas Wellness Center. Shortly after receiving the subpoena, I instructed my attorney to write a letter to the Assistant U.S. Attorney handling this matter to tell him that I do not have control or possession of any of the records named in the subpoena. I also agreed to send this affidavit for purposes of the grand jury.
2. Between approximately July 2004 and July 2005, I worked as a doctor for temporary hire at the South Texas Wellness Center, but I did not maintain control or possession of any records generated during my employment contract with the center.
3. At the time I worked at the Center, and to the best of my knowledge, Ada and Pleshette Johnson owned or had control of the Center's records.
4. I have no personal knowledge regarding the current whereabouts of the requested materials.
5. I previously gave the information set forth in paragraphs 2, 3, and 4 to DEA Diversion Investigators Connie Overton and Charlotte Washington, and later to a woman calling herself Judy Waterson.

I acknowledge the forgoing is a true and correct statement to the best of my knowledge.

Christopher Elder, MD

(Government's Consolidated Response to Defense Motions to Suppress Evidence (doc #129) at doc #129-2)

4. A document listing proceeds turned over by Christopher L. Elder, M.D., to South Texas Wellness Center in November and December, 2004, purportedly contains the signature of defendant Solomon. (Defendant Solomon's Supplemental Evidence in Support of Motion to Suppress All Evidence Obtained in Search of South Texas Wellness Center (doc #138) at doc #138-2) This document was notarized on December 9, 2004. (Id.)
5. The Articles of Organization of South Texas Wellness Centers, a limited liability company, show the members of the company as Pleshette Johnson, D.C., Ada Penrice Johnson, Luther L. Johnson, Jr. and Luther L. Johnson, III. (Government's Response in Opposition to Defendant Solomon's Motion to Suppress Evidence (doc #140) at Ex. A) These Articles of Organization were filed in the Office of the Secretary of State of Texas on February 27, 2004. (Id.) South Texas Wellness Centers, L.L.C.'s charter or certificate of authority was forfeited on February 3, 2006. (Id.) On November 6, 2006, a Texas Franchise Tax Public Information Report was filed. (Id.) The form required that each officer and director be listed. (Id.) The only name listed was P. Johnson. (Id.)
6. The Articles of Incorporation of Sojo Enterprises, Inc. show the initial Board of Directors as Pleshette Johnson and Troy Solomon. (Defendant Solomon's Supplemental Evidence in Support of Motion to Suppress All Evidence Obtained in Search of South Texas Wellness Center (doc #138) at doc #138-3) No evidence was presented to suggest that these Articles of Incorporation were ever signed or filed. No evidence was presented that Sojo Enterprises, Inc. is connected in any way to South Texas Wellness Centers, L.L.C.
7. A DEA Report of Investigation dated October 26, 2005, provides in part:
 6. October 25, 2005, Investigator Van Fleet interviewed Lynn ROSTIE, pharmacist of THE MEDICINE SHOPPE. ROSTIE stated that she was approached by Troy SOLOMON. SOLOMON presented himself as an agent of OKOSE. SOLOMON told ROSTIE that he owned SOUTH TEXAS WELLNESS CENTER, 3003 S. Loop West, Suite 450, Houston, Texas 77054. SOLOMON told ROSTIE that his patients were high-profile patients and sport figures who wanted anonymity when it came to their medical services.

(Defendant Solomon's Second Supplemental Brief With Evidence in Support of Motion to Suppress All Evidence Obtained in Search of South Texas Wellness Center (doc #141) at Ex. A)

8. A DEA Report of Investigation dated November 21, 2005, provides in part:
 5. Van Fleet stated he interviewed the owner of TMS, Lynn

ROSTIE regarding these suspicious prescriptions. ROSTIE indicated that this business arrangement was made with Troy SOLOMON, who presented himself as an agent of Dr. OKOSE and of Dr. ELDER. The prescriptions were faxed to TMS, and after filling them, ROSTIE would send the drugs to SOLOMON, instead of sending them to the patients. SOLOMON provided his address as South Texas Wellness Center, 3003 S. Loop West, Suite 450, Houston, TX 77054. ...

(Defendant Solomon's Second Supplemental Brief With Evidence in Support of Motion to Suppress All Evidence Obtained in Search of South Texas Wellness Center (doc #141) at Ex. B)

III. DISCUSSION

Defendants seek to suppress all evidence seized at the South Texas Wellness Center. The Government contends that defendants do not have standing to challenge the search of the South Texas Wellness Center.

Fourth Amendment rights are personal and may not be asserted vicariously. See United States v. Gomez, 16 F.3d 254, 256 (8th Cir. 1994). The Eight Circuit Court of Appeals stated in Gomez:

If a defendant fails to prove a sufficiently close connection to the relevant places or objects searched he has no standing to claim that they were searched or seized illegally. The defendant moving to suppress has the burden of proving a reasonable expectation of privacy in the area searched. Factors relevant to the determination of standing include: ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.

Id. (citations omitted)(emphasis supplied) The Supreme Court of the United States has advised that an expectation of privacy in commercial property is less than a similar expectation in a home. See Minnesota v. Carter, 525 U.S. 83, 90 (1998).

The Court will address the standing issue with respect to each defendant.

A. Defendant Delmon L. Johnson

Counsel for defendant Johnson admitted that he has no argument as to why defendant Johnson would have standing to challenge the search of the South Texas Wellness Center as he was nothing more than an employee of Ascensia Nutritional Pharmacy. (Tr.¹ at 6)

The Court finds that defendant Johnson has no standing to challenge the search warrant.

B. Defendant Christopher L. Elder

Counsel for defendant Elder advised that Elder had been a part-time employee of the South Texas Wellness Center. (Tr. at 12) Counsel conceded that Elder had no ownership interest in the South Texas Wellness Center and since Elder was no longer employed at the South Texas Wellness Center, he had no access to the premises. (Tr. at 15-16) However, according to defense counsel, defendant Elder had an expectation of privacy in the records as the prescribing physician. (Tr. at 14) Defendant argued that in O'Connor v. Ortega, 480 U.S. 709 (1987), the Supreme Court recognized that a physician, even when discharged or placed on administrative leave, still retains an expectation of privacy in files and file cabinets and other personal areas. (Supplemental Citations of Authority in Support of Defendant's Motion to Suppress the Search of the South Texas Wellness Center (doc #132) at 1)

The Government responds that the search warrant was executed at least ten months after defendant Elder had terminated his part-time employment with the South Texas Wellness Center. (Tr. at 17) Further, the evidence seized came from a computer located in the receptionist area and the computer belonged to the South Texas Wellness Center. (Id.) Finally, the Government argues that according to his affidavit, defendant Elder admitted that he did not maintain control or

¹“Tr.” refers to the transcript of the oral argument held on October 21, 2008.

possession of any records generated during his employment contract with the South Texas Wellness Center. (Id.) The Government distinguishes the case of O'Connor v. Ortega in that in Ortega, the Court merely found that a worker may have a reasonable expectation of privacy in the desk and file cabinets located in his own private office, while in this case, defendant Elder no longer had an office at the South Texas Wellness Center and the items seized were taken from a computer in the receptionist area. (Tr. at 16-17)

The Court agrees with the Government that the case of O'Connor v. Ortega is not controlling precedent given the facts of this case. The O'Connor case addresses the issue of whether a doctor has an expectation of privacy in his office at a hospital. 480 U.S. at 716-19. In finding that the doctor did have such an expectation in his desk and file cabinets, the Court stated:

The undisputed evidence discloses that Dr. Ortega did not share his desk or file cabinets with any other employees. Dr. Ortega had occupied the office for 17 years and he kept materials in his office, which included personal correspondence, medical files, correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos.

Id. at 718. Defendant Elder is certainly not in the same position as Dr. Ortega in that Elder's private office was not searched. Defendant Elder had not even worked at the South Texas Wellness Center for ten months prior to the time the search warrant was executed.

The evidence before the Court does not support a finding that defendant Elder had a reasonable expectation of privacy in the South Texas Wellness Center. As defense counsel admitted, defendant Elder had no ownership interest in the South Texas Wellness Center. (Tr. at 15-16) As defendant Elder admitted, he had no control or possession of the records at the South Texas Wellness Center. (See Fact No. 3, supra) Defendant Elder was not even employed at the South Texas Wellness Center at the time of the search. The Court finds that defendant Elder has not

met his burden of proving a reasonable expectation of privacy in the area searched.

C. Defendant Troy R. Solomon

While counsel for defendant Solomon argues that defendant Solomon was a partial owner of the South Texas Wellness Center during the time in question,² the evidence before the Court does not support this argument. The evidence provided by defendant Solomon consists of a document listing proceeds turned over by Christopher L. Elder, M.D., to South Texas Wellness Center in November and December, 2004, which purportedly contains the signature of defendant Solomon but which does not identify Solomon as an owner of the South Texas Wellness Center and which is dated a year and a half before the subject search warrant; an unsigned and unfiled copy of Articles of Incorporation of a corporation (Sojo Enterprises, Inc.) which has no apparent relationship to the South Texas Wellness Center; and two DEA Reports of Investigation which provide that defendant Solomon told defendant Rostie that he was an owner of the South Texas Wellness Center. (See Fact Nos. 4, 6, 7 and 8, supra) Government counsel has provided the Court with a signed and filed copy of the Articles of Organization of South Texas Wellness Centers which shows the members of the company as Pleshette Johnson, D.C., Ada Penrice Johnson, Luther L. Johnson, Jr. and Luther L. Johnson, III, and a Report dated November 6, 2006, which shows the sole officer and director of South Texas Wellness Centers LLC to be P. Johnson. (See Fact No. 5, supra)

Other than defendant Solomon's statement to defendant Rostie that he was an owner of the South Texas Wellness Center, there is absolutely nothing to suggest that Solomon had an ownership interest in the South Texas Wellness Center. The Court finds this unsupported statement insufficient to prove an ownership interest in the South Texas Wellness Center. Defendant Solomon has been

²(Tr. at 4-5)

given more than an adequate opportunity to present evidence of his ownership in the South Texas Wellness Center, if such evidence exists. The Court finds that defendant Solomon has not met his burden of proving a reasonable expectation of privacy in the area searched.

Given defendants' lack of standing, the motions to suppress must be denied.

IV. CONCLUSION

Based on the foregoing, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying defendant Elder's Motion to Suppress All Evidence Seized From the South Texas Wellness Center (doc #96) and defendants Solomon's and Johnson's Combined Motion to Suppress All Evidence Obtained in Search of South Texas Wellness Center (doc #115).

Counsel are reminded they have ten days in which to file any objections to this Report and Recommendation. A failure to file and serve objections by this date shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

/s/ Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE