

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

UNITED STATES OF AMERICA)
)
) Plaintiff,)
)
) v.) No. 08-00026-04-CR-W-FJG
)
CHRISTOPHER L. ELDER,)
)
) Defendant.)

DEFENDANT ELDER’S OBJECTIONS TO THE MAGISTRATE JUDGE’S
REPORT AND RECOMMENDATION (DOC. 144) RECOMMENDING TO THE
DISTRICT COURT THAT DEFENDANT’S MOTION TO SUPPRESS
EVIDENCE SEIZED FROM THE SOUTH TEXAS WELLNESS CENTER BE
DENIED WITH SUGGESTIONS IN SUPPORT OF THE OBJECTION

COMES NOW defendant Elder and files his objections to the Magistrate
Judge’s R&R (doc. 144). Defendant submits the following in support of his
objections:

1. Defendant agrees with the following “findings of facts” paragraphs in the
Magistrate’s R&R: 1, 3, 4, 5, and 6. Defendant took issue with many of the facts
contained in the Affidavit for Search and requested a *Franks* hearing to address
omissions and commissions in his motion to suppress (doc. 115) (See Magistrate’s

reliance on factual matters set forth in the affidavit set forth in para. 2 of the R&R); *Franks v. Delaware*, 438 U.S. 154 (1978).

2. In the discussion portion dealing with defendant Elder (See paragraph B commencing at page 8 of the R&R), the Magistrate purports to summarize the positions of the government and the defense with respect to Elder's legal right to control medical records created by him while employed at South Texas Wellness Center (STWC) and concludes that Elder had no expectation of privacy over such records. The Magistrate Judge seems to rely on an argument that Elder's private office was not searched and that he had not been employed at STWC for over 10 months, facts defendant does not dispute.

3. Standing, now more commonly referred to as "expectation of privacy", is of course a predicate issue that usually determines whether further inquiry into the validity of a search warrant is subject to attack by the complaining party. See *Rakas, v. Illinois*, 439 U.S. 128 (1978); *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994). Defendant Elder relied on *O'Connor v. Ortega*, 480 U.S. 709 (1987) in making his argument that as the attending physician he has residual control and ethical responsibility over any medical records he created on behalf of a patient and that indeed HIPAA, and other Title 42, U.S.C. statutes dealing with confidentiality of medical records, as well as requirements of his own licensing board, create a right of privacy in the records both for the patient and the doctor who created the records and

that Elder, even though he had left employment of STWC, has sufficient overall connection to those records to object to the seizure of them. See *In Re Administrative Subpoena*, 289 F.3d 843 (6th Cir. 2001) for a general discussion as to the sensitivity of medical records and when and under what circumstances the government can obtain such records in connection with a criminal investigation. While this case is not relevant to the legal issue before this court it is instructive on the general issue of medical records and their disclosure.

4. Elder never contended in his motion to suppress that his private office was searched. His focus is on the seizure of records he created that he has expectation will be maintained in locked or limited access containers and not disclosed to third parties without Elder's permission or that of the patient. Doctor Elder submits that this is consistent with the spirit of *Rakas*, *Ortega*, and *Gomez*, *supra*, and that physical presence in the office or the requirement that he have an office there is not determinative.

5. Additionally, defendant believes the Magistrate erred by failing to conduct a factual hearing on the issue of standing. While the parties were given ample opportunity to summarize their arguments, once the Magistrate had doubts on the issue of standing, she should have conducted an evidentiary hearing to determine: exactly where the records were kept; who created them and under what circumstances; what security measures were in place; what the standard office

operating procedure was when Elder was employed there, if any, and what it was on the date of the search; what procedures are used to store old records of former patients; and a general inquiry into the method of operation of STWC. See *United States v. Best*, 135 F.3d 1223 (8th Cir. 1998) (case remanded for a hearing on standing where no proper determination was factually made at the trial court level).

6. As a final matter, the Magistrate has not ruled on the several significant issues addressed in defendant Elder's motion to suppress that go to the validity of the warrant and whether defendant was and is entitled to pierce the warrant in a *Franks* hearing. Defendant obviously wishes to preserve these issues as well before the district court and does not waive any arguments made simply because they have not been ruled by the Magistrate Judge.

WHEREFORE, defendant Elder submits his objections and moves the Court to enter a finding that defendant does indeed have standing and remand the matter back to the Magistrate for further proceedings, or alternatively, to remand the matter back to the Magistrate for further consideration of the standing issue in light of defendant's objections.

Respectfully submitted,

/s/

John R. Osgood
Attorney at Law, #23896
Commercial Fed Bnk- Suite 305
740 NW Blue Parkway

Osgood Law Office
Email: jrosgood@earthlink.net
Web site: www.juris99.com/

Lee's Summit, MO 64086

Office Phone: (816) 525-8200

Fax: 525-7580

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on December 6, 2008.

/s/

JOHN R. OSGOOD