

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

UNITED STATES OF AMERICA

v.

MARY LYNN ROSTIE,
CYNTHIA S. MARTIN,
TROY R. SOLOMON,
CHRISTOPHER J. ELDER, and
DELMON L. JOHNSON

Defendants

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NO. 08-00026-01/05-CR-W-FJG

**DEFENDANT TROY R. SOLOMON'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**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, TROY R. SOLOMON, Defendant, and files his objections to the Magistrate Judge's Report and Recommendation of December 4, 2008, and in support hereof would respectfully show unto this Court as follows:

1. Defendant SOLOMON agrees with paragraphs 1, 2, 4, 5, 7, and 8 contained within the "FACTS" portion of the Magistrate's Report and Recommendation. Defendant Solomon has no personal knowledge of the facts contained within paragraph 3 and takes issue with the characterizations contained within paragraph 6.

2. Defendant has previously taken issue with many of the facts contained in the Affidavit for Search made by Diversion Investigator Connie L. Overton upon which the Magistrate heavily relies and has requested a *Franks* hearing to address certain omissions and commissions related therein as part of his previously filed Motion to Suppress.

3. The basis of the Magistrate's recommendation to deny Defendant SOLOMON's Motion to Suppress is a determination that he lacks standing to challenge the search because he had no expectation of privacy in South Texas Wellness Center. The Magistrate concluded that Defendant SOLOMON failed to produce adequate evidence establishing that he was an owner or co-owner of the business. Unfortunately, neither Defendant SOLOMON nor the Magistrate had access to additional evidence (discussed hereinbelow) recently produced by the Government which establish that Defendant SOLOMON was indeed a partner in South Texas Wellness Center with standing to challenge the search under Texas law.

4. In addition, the Magistrate focuses too narrowly on the business entity organized as South Texas Wellness, L.L.C., in making her determination regarding standing. The search warrant and supporting affidavit instead detail activities, items, and premises related to "SOUTH TEXAS WELLNESS CENTERS" at a certain address, making no mention of the specific organizational structure.

5. Under Texas law, a partnership is an association of two or more persons to carry on a business for profit as owners, **regardless of whether the persons intended to create a partnership**. TEX. BUS. ORG. CODE §152.051 (emphasis added). Texas law provides specific rules for determining whether a partnership is created. *See* TEX. BUS. ORG. CODE §152.052. The factors indicating that persons have created a partnership include the persons': (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing losses of the business; and (5) agreement to contribute or contributing money or property to the business. TEX. BUS. ORG. CODE §152.052(a). All factors need not be present.

6. On December 3, 2008, the government produced a Report of Investigation regarding its interview of Pleshette Johnson, D.C., who, by all accounts, is an owner of South Texas Wellness Center. A true and correct copy of said report is attached hereto as Exhibit "A" and is incorporated herein by reference. According to the report, Dr. Johnson stated that Defendant SOLOMON was an "investor" in the business, having provided an estimated \$20,000.00 for the payment of rent, utilities, and payroll at South Texas Wellness Center. *See* Exhibit "A", paragraph 6. Dr. Johnson admits that there were discussions about Defendant SOLOMON becoming a part owner of South Texas Wellness Center and further describes an agreement whereby Defendant SOLOMON received a share of the profits from South Texas Wellness Center. *See* Exhibit "A", paragraph 7. Dr. Johnson confirms the authenticity of document #138-2 previously attached to Defendant SOLOMON's Supplemental Evidence in Support of Motion to Suppress All Evidence Obtained in Search of South Texas Wellness Center (doc #138) and the intent to distribute proceeds from the business that said document represents. *See* Exhibit "A", paragraph 7, paragraph 11, and attachment 1. Dr. Johnson further describes Defendant SOLOMON's participation or right to participate in control of the business, including specifically his signature on business documents reflecting receipt of proceeds and his participation in discussions regarding management decisions. *See* Exhibit "A", paragraph 11, and attachment 1. While Dr. Johnson was careful to say that Defendant SOLOMON was not an owner despite all these facts to the contrary, Texas law is clear that the parties' intent to create a partnership is not a prerequisite to its creation. TEX. BUS. ORG. CODE §152.051(b)(1).

7. Dr. Johnson's statements, as represented in the Government's Report of Investigation, provide additional evidence that: Defendant SOLOMON contributed money and property to South Texas Wellness Center (TEX. BUS. ORG. CODE §152.052(a)(5)); that Defendant SOLOMON

received a share of the profits of South Texas Wellness Center (TEX. BUS. ORG. CODE §152.052(a)(1)); that there was an expression of intent that Defendant SOLOMON be treated as a partner in the business (TEX. BUS. ORG. CODE §152.052(a)(2)); that Defendant SOLOMON participated in, or had a right to participate in, control of the business (TEX. BUS. ORG. CODE §152.052(a)(3)); and that he shared in the losses of the business (TEX. BUS. ORG. CODE §152.052(a)(4)). This evidence establishes Defendant SOLOMON's partnership interest in South Texas Wellness Center under Texas law. As a partner, Defendant SOLOMON had an expectation of privacy in every aspect of the business and, therefore, has standing to challenge the search of its premises, files, computers, and other documents and tangible things.

8. Standing, now more commonly referred to as “expectation of privacy”, is a predicate issue that usually determines whether the validity of a search warrant is subject to attack by the complaining party, and whether further inquiry into the validity of a search warrant is merited. *See Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994). As noted in the Magistrate's Report, the Eighth Circuit Court of Appeals stated in *Gomez*:

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.

United States v. Gomez, 16 F.3d 254 (emphasis added).

9. In addition to the foregoing, Defendant SOLOMON believes the Magistrate erred by failing to conduct an evidentiary 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, an evidentiary hearing should have been held to determine the ownership status of South Texas Wellness Center. The Government's continuing delays in making discovery should also be noted.

10. Moreover, the Magistrate has not ruled on several other significant issues addressed in Defendant SOLOMON's motion to suppress that go to the validity of the warrant in a *Franks* hearing. Defendant SOLOMON does not affirmatively waive any rights simply because they have not been ruled upon by the Magistrate Judge.

WHEREFORE, Defendant SOLOMON submits his objections and moves the Court to enter a finding that he does have standing to challenge the search of South Texas Wellness. Defendant SOLOMON prays that this Court remand the matter to the Magistrate Judge for further proceedings or, alternatively, grant his Motion to Suppress.

Respectfully submitted,

BANNWART & ASSOCIATES, P.C.

By: 

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ATTORNEYS FOR DEFENDANT,
TROY R. SOLOMON

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Defendant Troy R. Solomon'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 has this day been sent via electronic filing to all parties of record.

SIGNED this 14th day of DECEMBER, 2008

BANNWART & ASSOCIATES, P.C.

By:



ANTHONY L. BANNWART

ATTORNEYS FOR DEFENDANT,
TROY R. SOLOMON

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