IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) Criminal No.02-250
)
VS.)
)
ALBERTO ALCALA, BALDEMAR)	ORDER
NARANJO BRITO, AGUSTIN)
RANGEL, ALICIA BARAJAS,)
AGUSTIN SOLORIO MENDEZ,)
and MONICA CARRILLO)
)
Defendants)

Before the Court are Agustin Solorio Mendez's ("Mendez") and Monica Carillo Godinas' ("Godinas") motions to suppress evidence allegedly obtained in violation of the Fourth Amendment.

The government resisted this motion, and the Court held an evidentiary hearing on January 30, 2003.

The matter is now ready for ruling.

I. BACKGROUND

On October 23, 2002, Augustin Rangel-Arteaga ("Rangel"), a co-defendant in this case, told government agents that a man named "Guerro" was a large-scale cocaine distributor. Rangel indicated that "Guerro" lived on Highway 22 between Muscatine and Buffalo, Iowa. He advised that "Guerro" obtained kilogram quantities of cocaine from a source in Washington and Colorado and drove either a Honda or a Jeep Cherokee.

Later that day, Rangel led federal agents to 2897 Highway 22 East, which he identified as "Guerro's" residence. A white Jeep Cherokee with temporary license plates was parked in the

driveway. Rangel told the officers the Jeep belonged to "Guerro."

Rangel then told investigators that he knew "Guerro's" telephone number. At the investigators' request, he telephoned "Guerro" to arrange for the delivery of one kilogram of cocaine at the Hy-Vee parking lot in Muscatine, Iowa. When he finished the call, Rangel told officers that "Guerro" had agreed to deliver 1 kilogram of cocaine to him at the Hy-Vee parking lot in five minutes. The approximate driving time between 2897 Highway 22 East and the Hy-Vee parking lot is five minutes.

Federal agents and local law enforcement set up surveillance at the Hy-Vee parking lot. They drove Rangel's car to the lot and secured him in the front seat of the car. Officers instructed Rangel to pump his brakes when the drug transaction was complete.

Approximately five minutes later, around 12:00 a.m., a white Jeep Cherokee with Colorado temporary license plates pulled into the parking lot and stopped next to the passenger side window of Rangel's vehicle. Investigators noted that there were few cars in the parking lot, and that parking spaces were available closer to the store. Shortly after the Jeep arrived, Rangel signaled the investigators by pumping his break lights. Officers observed no contact between Rangel and the white Jeep Cherokee. However, the investigators were aware that Rangel was unable to roll down the windows or get out of his car, because they had removed the keys from the car and had placed Rangel in restraints. In response to Rangel's signal, police officers attempted to pull over the white Jeep Cherokee. After attempting to leave the parking lot at a high rate of speed, the white Jeep Cherokee stopped. Investigators identified the driver of the Jeep Cherokee to be defendant, Agustin Mendez

¹ Surveillance officers encountered the white Jeep Cherokee approximately 1.5 miles from 2897 Highway 22 East and followed the vehicle to the Hy-Vee parking lot.

Solario ("Mendez"). The passenger identified herself as Gabriela Castillo Garcia ("Garcia"). Officers searched the vehicle and discovered a Ritz cracker container containing approximately one kilogram of powder cocaine.

The officers placed Mendez and Garcia under arrest and transported them to the Sheriff's office near the edge of town for questioning. While defendants were being questioned, Officer Jirak ("Jirak") started to prepare a search warrant affidavit for the residence located at 2897 Highway 22 East. However, Jirak aborted the search warrant application part way through the process, believing that exigent circumstances required quicker action. According to Jirak, investigators feared that any drugs at the residence would be destroyed during the time it would take to obtain a warrant.² Jirak admitted, however, that he learned no new information between the time Mendez and Garcia were arrested and the time the search warrant application was aborted.

Agent Dan Stepleton ("Stepleton") testified that approximately fifty-five minutes after Mendez and Garcia were arrested, officers proceeded to the residence at 2897 Highway 22 East with hope of obtaining consent to search the residence. Upon arrival, Stepleton and Jirak approached the back door of the residence. A Hispanic woman, Norma Liliana Sanchez Garcia ("Sanchez"), answered the door. Stepleton identified himself and Jirak to Sanchez in Spanish as police officers. Jirak was wearing a Muscatine Police Department badge. Sanchez looked at both officers, but did not say anything.

² At the hearing, there was some discussion that Garcia told investigators that she left her child at the residence with a female whose name was unknown. Officer Jirak testified that this factor contributed to the officers' decision to go to the residence without first obtaining a search warrant. However, the Government stipulated that this evidence did not constitute an exigent circumstance justifying a warrantless entry.

Stepleton again identified him and Jirak as police officers and pointed to Jirak's badge. At this point, Sanchez closed and locked the door.

Deputy Carbonell ("Carbonell") testified that he was initially positioned on the other side of the residence. When Sanchez closed the door, Stepleton called for agent Carbonell to come around to the back door. Carbonell arrived, knocked on the door and yelled "police, open the door," in Spanish. Carbonell testified that he heard talking and shuffling coming from inside the residence. Shortly after he began to knock, he heard a woman say "wait" or "no." Carbonell testified that he heard other conversation coming from within the residence that he did not understand. Similarly, Jirak testified that he heard quick footsteps running through the house and a "thrashing" sound. Stepleton testified that he placed his ear to the front of the door and heard sounds of people scurrying around. He further testified that he heard someone in the residence say, "hide it, hide it" in English. Approximately three seconds later the officers forcibly entered the residence.

Paloma Smith ("Smith") was in the house with Sanchez when the police forcibly entered. She testified that she normally speaks in her native language, Spanish, although she can speak English. Smith also testified that because Sanchez cannot speak English, they always speak in Spanish when they are together. Smith testified that she said "just a minute, just a minute," not "hide it, hide it," after the officers demanded Sanchez open the door. According to Smith, her hand was on the door when police officers kicked it open. Smith further testified that she did not see Sanchez move prior to the officers' entry, nor did she know there was cocaine in the residence.

Upon entering, Stepleton saw Sanchez run toward the bathroom carrying a white plastic bag.

He ran to the bathroom and observed Sanchez deposit the white plastic bag and its contents into a

garbage receptacle. Stepleton retrieved the bag and discovered it contained numerous clear plastic bags containing a white powdery substance. The substance was later confirmed to be approximately five pounds of powder cocaine.

Based upon the aforementioned circumstances, investigators sought and received a State of Iowa Search Warrant for the residence located at 2897 Highway 22 East. They subsequently served the search warrant and located numerous items consistent with the illegal distribution of controlled substances.

II. APPLICABLE LAW AND DISCUSSION

• The Automobile

Defendants first argue that the warrantless search of the Jeep Cherokee violated their Fourth Amendment Rights. As the Supreme Court has stated, "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Pennsylvania v. Labron, Pennsylvania v. Kilgore,* 518 U.S. 938, 940 (1996). The Court finds that Mendez's Jeep Cherokee was readily mobile. The question remaining is whether there was probable cause to search for contraband.

Rangel, a cooperating co-defendant, led officers to Mendez's residence and identified the white Jeep Cherokee parked outside that residence as "Guerro's" automobile. Rangel then telephoned "Guerro" and told him to bring one kilogram to the Hy-Vee parking lot in five minutes. Approximately five minutes later, the white Jeep Cherokee arrived at the parking lot as scheduled and pulled up next to Rangel's vehicle. Approximately thirty seconds later, Rangel signaled police that there were drugs in the Jeep. The Court finds these facts sufficient to establish probable cause. *See Illinois v. Gates*, 462

U.S. 213, 238 (1983) (probable cause exists if, under the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place). Accordingly, the Court finds that the detention and search of the automobile did not violate the Fourth Amendment.

Defendant Mendez argues that even assuming probable cause existed to search the Jeep, no probable cause existed to search the sealed Ritz cracker box taken from the vehicle. In support of his argument, he cites to *United States v. Chadwick*, 433 U.S. 1, 15 (1977), for the proposition that: "When a warrantless search of an item is conducted after that item comes under the exclusive control of law enforcement, any claimed exigency ceases to exist and thus the search is impermissible." Motion to Suppress Fruits of Search, ¶ 32. Counsel's reliance on *Chadwick* is misplaced. This language from *Chadwick* refers to the search incident to arrest exception to the warrant requirement. It is not a limitation on the automobile exception. The scope of an automobile search extends to all closed and open containers in the vehicle for which there is probable cause to search. *United States v. Ross*, 456 U.S 798, 824 (1982). The Court finds that there was probable cause to search the Ritz cracker box, and that the search was constitutional.

• The Residence

Defendants next argue that the warrantless search of residence violated their Fourth Amendment rights. A warrantless entry into one's home is unreasonable under the Fourth Amendment, absent consent or probable cause coupled with exigent circumstances. *Payton v. New York*, 445 U.S. 573, 589-90 (1980). The Court finds, and Defendant Godinas concedes, that there was probable cause to search the residence at 2897 Highway 22 East. The question remaining is whether an

exigency justified the warrantless, non-consensual search. The government bears the burden of establishing that exigent circumstances existed. *United States v. Clement*, 854 F.2d 1116, 1119 (8th Cir. 1988).

Exigent circumstances must be assessed in light of the totality of the circumstances. *United States v. Conner*, 948 F. Supp. 821, 846 (N.D. Iowa 1996). "The test is 'whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *Id.* (quoting *United States v. Wihbey*, 75 F.3d. 761, 765 (1st Cir. 1996). The Eighth Circuit has recognized that the seriousness of the offense is one factor to consider. *United States v. Ball*, 90 F.3d 260, 263 (8th Cir. 1996). However, it has also recognized that "the exigent circumstances exception to the warrant requirement is narrowly drawn." *Id.*

A warrantless search of a residence to prevent the destruction of evidence may be justified if factual circumstances demonstrate a sufficient basis for law enforcement to believe somebody in the residence will destroy evidence. *United States v. Munoz*, 894 F.2d 292, 296 (8th Cir. 1990). However, exigencies manufactured by the government cannot justify a warrantless entry. *See United States v. Johnson*, 12 F.3d 760, 764 (8th Cir. 1990); and *United States v. Duchi*, 906 F.2d 1278, 1282 (8th Cir. 1990)). As the *Conner* Court explained:

In determining whether the police manufactured the exigent circumstances, the court must 'first examine[] the reasonableness and propriety of the investigative tactics that generated the urgent situation,' although the ultimate question is how did the urgent circumstances come about. If the heightened danger that evidence would be destroyed . . . was the probable result of the officers' conduct, the officers' conduct created the danger, and the exigent circumstances resulting from that conduct cannot justify the officers' warrantless entry.

Conner, 948 F. Supp. 821, 847 (quoting Johnson, 12 F.3d at 764).

Looking at the facts under the totality of circumstances, the Court finds that no exigent circumstances justified the warrantless entry in this case. The officers testified that they went to the residence to obtain consent to search. Rather than having Jirak continue with the warrant application process, the law enforcement officials made a tactical decision to abandon that effort and proceeded to the residence without a warrant. When asked why he aborted his efforts to obtain a warrant, Jirak testified that the officers were concerned evidence would be destroyed if they took the time to obtain a warrant. The record belies the officers' purported fear.

First, the officers had no evidence that anyone remaining at the residence was involved in drug activity. The informant, Rangel, gave the officers no information suggesting that co-conspirators were at the residence. Although Godinas told the officers that a woman was taking care of her children at the residence, she never suggested that the woman was involved in, or even knew of, Godinas' and Mendez's drug activities. Second, the officers had no reason to believe that anyone at the residence knew or had reason to know that Mendez and Garcia had been arrested. For example, the officers had no reason to believe there was a callback arrangement between defendants. *See United States v. Perez*, 700 F.2d 1232, 1237 (8th Cir. 1983) (warrantless search of defendant's residence was not justified by exigent circumstances where there was no callback arrangement between defendant and the person at defendant's residence, and nothing in the record suggested that the person at the residence knew that defendant had been arrested).

Third, and most significantly, is the officers' dilatory response to their professed fear. The record shows that officers did not go to the residence until fifty-five minutes after arresting Garcia and Mendez. However, Jirak admitted that no new information arose between the time Garcia and Mendez

were arrested and the time officers went to the residence. During the fifty-five minutes it took to bring the suspects back to the Sheriff's office and question them, the vast majority, if not all, of the information in the warrant could have been prepared and completed. *See United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1984) ("[W]hile the opportunity to seek a warrant is not determinative, it is certainly relevant when exigent circumstances are pleaded..") (internal citations omitted).

In its resistance to defendants' motion to suppress, the government relies on *United States v*. *Clement*, 854 F.2d 1116 (8th Cir. 1988). In *Clement*, the district court held that exigent circumstances justified the government's warrantless entry into Clement's hotel room, because agents "reasonably inferred that [Clement was] expecting [his] associates to return with proceeds of the earlier sale of cocaine[,] and that their nonappearance could be expected to warn Clement that the sale had failed." *Id.* at 1119. The district court found that this created a significant risk that Clement would destroy the remaining cocaine. *Id.* The district court held that this risk, coupled with the scrambling noises the officers heard after knocking on Clement's motel room door, justified the officers' warrantless entry. *Id.* at 119-1120.

On appeal, the majority held that the district court's finding was not clearly erroneous. *Id.* at 1120. In his dissenting opinion, Judge Bright expressed concern over extending the exigent circumstances exception, because there was no evidence in the record that Clement in fact was expecting his associates to return. *Id.* at 1121 ("[T]o dispense with the warrant requirement simply on the mere possibility that evidence will be destroyed renders the Fourth Amendment impotent.).

However, the majority held that the that the officers' knowledge³ that Clement and his associates were drug conspirators justified the officers' inference that the associates' non-return would prompt Clement to destroy evidence.

The case at bar is distinguishable from *Clement*. Here, officers had no evidence that the people at the residence, who were later determined to be Sanchez and Smith, were involved with drug activities. There was no evidence that Sanchez and Smith were coconspirators, or that they even had knowledge of Mendez's and Godinas's drug crimes. Thus, unlike *Clement*, the officers' inferences that Sanchez and Smith expected Mendez and Godinas to immediately return to the residence, and that Sanchez and Smith would destroy drugs in the event Mendez and Godinas did not immediately return, were based on nothing more than a hunch. This Court is unwilling to dispense with the warrant requirement based on mere hunches, especially where it is so clear that officers could easily have been obtained a warrant had they bothered to do so.

The Court finds that the officers' decision to abort the search warrant process is inexplicable.

The officers had no reason to believe anyone at the residence was involved in drugs; they had no reason to suspect that anyone at the residence knew defendant had been arrested; and the delay officers would have experienced as a result of obtaining a search warrant would have been minimal, if any at all. The court finds that the officers' unreasonable tactical decision "generated [any] urgent

³Cooperators arranged for Clement to bring five kilograms of cocaine from Miami to St. Louis. *Id.* The officers observed Clement and his associates arrive together at the St. Louis airport and observed all of them enter Clement's hotel room. *Id.* When the associates left Clement's hotel room, they were arrested for attempting to sell two kilograms of cocaine. *Id.*

situation" that may have ensued at the residence.⁴ *United States v. Johnson*, 12 F.3d 760, 764.

Because the "officers' conduct created the danger, . . . the exigent circumstances resulting from that conduct cannot justify the officers' warrantless entry." *United States v. Conner*, 948 F. Supp. 821, 847 (N.D. Iowa 1996).

Based on the foregoing, the Court denies defendants' motion to suppress the evidence obtained from the search of the white Jeep Cherokee. The Court grants defendants' motion to suppress the fruits of the warrantless search of the residence located at 2897 Highway 22 East, Muscatine, Iowa.

IT IS SO ORDERED.

Dated this 19th day of February, 2003.

United States District Court

⁴ The Court notes that the record contains conflicting testimony about what transpired at the residence. After Stepleton identified himself and Jirak as officers, Sanchez closed and locked the door. Carbonell testified that shortly thereafter he heard shuffling sounds coming from within the residence. Jirak testified that he heard quick footsteps and a "thrashing sound." In addition, Stepleton testified that he heard someone from within the residence say, "hide it, hide it." The Court is concerned with the credibility of this testimony. Smith, who is not facing criminal charges in this matter, testified that there was no scurrying about inside the residence as the officers described. She further testified that Spanish is her native language, that Sanchez cannot speak English, and that when the two are together, they always speak in Spanish. After hearing Smith testify at the hearing, the Court firmly believes that Spanish is her native language and highly doubts that she or Sanchez would have spoken in English during the events in question. The Court also notes that no evidence was introduced at the hearing that could explain what the "thrashing" sound Jirak claims to have heard may have been.