FILED
DES MOINES, IOWA
02 FEB 19 PM 2:22
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IA

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 01-157
	)	
vs.	)	
	)	
LARRY DEWAYNE STEWART,	)	ORDER
	)	
Defendant.	)	

Before the Court is a motion to suppress filed by defendant, Larry Stewart, on January 24, 2002. The government resisted the motion but did not file a brief. A hearing was held February 14, 2002. The matter is fully submitted.

I. BACKGROUND

Law enforcement obtained a search warrant for apartment number four at 1104 25th Street in Des Moines. Sergeant David F. Brown of the vice and narcotics control section of the Des Moines Police Department testified that he supervised the execution of the search warrant at this apartment on October 22, 1999. Officers entered the apartment building at 1104 25th Street after 10:00 p.m.,[1] and proceeded up the stairs to the hallway where apartment four was located.

Sergeant Brown testified that other officers arrived at the hallway where apartment four was located before he did, and that those officers were already securing apartment four and the

[1] As the events at issue in this case occurred more than two years ago, Sergeant Brown indicated he was not certain what time the officers entered the building to execute the search warrant. Defendant stated at the hearing that the officers entered the building at 11:05 p.m. on October 22, 1999.

people present when he arrived shortly thereafter.[2] Sergeant Brown stated the door to apartment number five, which is in the same hallway as apartment number four, was open when he arrived. The scope of the search warrant did not include apartment five.

Defendant Larry Stewart also testified at the hearing. He was the building manager and groundskeeper for the building at 1104 25th Street, and he lived in apartment five. Stewart had been living there and working in that capacity for approximately eight months. On the evening of October 22, 1999, Stewart testified two individuals were cleaning apartment four, and that it was empty except for a radio and cleaning supplies. Stewart indicated he spoke with the two individuals cleaning apartment four, and then stepped into his apartment and closed the door. He stated that after he closed the door, he heard a loud crash outside of his apartment. Stewart then opened his door, and he stated that a police officer put a gun in his face and told him to lie down on the floor, despite the fact that he identified himself as the building manager. Stewart testified that he lay down in the entryway to his apartment, and was then handcuffed. Stewart stated officers then stepped over him and went in and out of his apartment. He asked the officers why they were entering his apartment, and was told they were protecting themselves and making sure no one else was in Stewart's apartment.

Sergeant Brown testified when he arrived at the scene, while the door to apartment five was open, Stewart was not lying in the entryway but was inside apartment four with the other two individuals present at the scene when police arrived. Sergeant Brown testified that all three individuals would have been handcuffed and lying face-down on the floor at that time, but that at some later time would have been allowed to sit up. Stewart stated that after a period of time

---

[2] Sergeant Brown indicated he arrived at the upstairs hallway where apartment four was located less than fifteen minutes after the other officers.

laying in a face-down position in the entryway to his apartment, he was moved into apartment four.

Officer Eric Ortman of the Drug Enforcement Agency ("DEA") task force arrived at the scene in the early morning hours of October 23. When he arrived, Stewart was inside apartment four. Officer Ortman testified he spoke with some of the other officers upon his arrival, and then approached Stewart and verbally requested his consent to search his apartment, number five. Stewart then allegedly gave Officer Ortman verbal consent to search his apartment. Officer Ortman states he also provided Stewart with a "Consent to Search" form, and that Stewart signed it. The government submitted a copy of this form as Exhibit 1 at the hearing, and this copy indicates it was signed at 2:15 a.m. on October 23, 1999. Officer Ortman stated that he did not make any threats toward Stewart, and that Stewart was cooperative. Sergeant Brown testified that he was standing in the hallway and witnessed Officer Ortman obtain Stewart's verbal and written consent inside apartment four. The testimony of both officers was that Stewart was not lying face-down on the floor when he gave his consent, but they were uncertain whether he was sitting or standing.

The government was not able to present the Court with the original of the "Consent to Search" form it alleges Stewart signed on October 23, 1999. Officer Ortman testified that he shredded the form. It is unclear when he shredded the form. He explained that at the time he made the decision to shred it, the Des Moines Police Department was in the process of transferring to what he described as a "paperless system," and that the "Consent to Search" form at issue was scanned in the computer before he shredded it. Officer Ortman testified that it was his belief at the time he shredded the document that it was not necessary to keep the

original. Officer Ortman recognized at the hearing that he should not have shredded the document.

Officer Ortman also testified that later it became necessary to send a copy of the "Consent to Search" form to the Iowa Department of Public Safety's Division of Criminal Investigation ("DCI") laboratory for handwriting analysis, as the original was no longer in existence.[3] DCI issued a report dated April 20, 2001, and this report was received into evidence at the hearing as defendant's exhibit A. The report indicated that a conclusion could not be reached about whether the handwriting was Stewart's without viewing the original signature on the "Consent to Search" form, as "[m]ost photocopy and digital reproductions do not typically retain details of the microscopic characteristics of handwriting." *See* Defendant's Exhibit A. The report also stated that "[t]he image of the questioned signature has the appearance of not having been freely and naturally written." *Id.*

Stewart testified that he never gave consent to search his apartment, nor did he sign a "Consent to Search" form. This testimony was corroborated by another witness who appeared by telephone at the hearing, Jeffrey Eugene Gatewood, who was present in apartment four on October 22, 1999. Gatewood testified he did not see Stewart give the officers consent to go into apartment five. Stewart stated it is not his signature on government's exhibit 1. Stewart specifically pointed out that government's exhibit 1 lists a vehicle, a "white bonneville," as something he supposedly gave the officers consent to search. Stewart stated he has never owned such a vehicle, and would never give officers the right to search a vehicle he does not own. Stewart admitted that he signed a document on the evening in question, but that all this

---

[3] Testimony at the hearing indicated the copy of the form was sent to the DCI as a part of a then on-going prosecution against Stewart in state court.

document indicated was that he acknowledged the officers were confiscating the belongings that were on his person. Furthermore, Stewart testified that he asked a female officer, named Officer Blade, to stop going into his apartment that night.

In his motion, Stewart requests the Court suppress all evidence taken directly or indirectly as a result of law enforcement's search of apartment five at 1104 25th Streeet in Des Moines on October 22 and 23, 1999. Stewart asserts law enforcement did not have his consent to search the apartment, and the attorney for the government indicated at the hearing the motion hinges on consent – whether Stewart gave his consent or whether law enforcement reasonably believed it had Stewart's consent.

II. APPLICABLE LAW & DISCUSSION

The Fourth Amendment prohibits unreasonable searches. U.S. Const. amend. IV. "Searches voluntarily consented to do not offend this prohibition." *United States v. Zamoran-Coronel*, 231 F.3d 466, 468 (8th Cir. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). If a person voluntarily consents to a search, then law enforcement officials may conduct a search without a warrant and without probable cause. *See United States v. Reinholz*, 245 F.3d 765, 780 (8th Cir. 2001) (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974) (other citation omitted)). "The burden is on the [g]overnment to show by a preponderance of the evidence that, under the totality of the circumstances, the defendant voluntarily consented." *Reinholz*, 245 F.3d at 780 (citations omitted). The government must show defendant consented, or it must prove officers reasonably believed defendant consented. *See Zamoran-Coronel*, 231 F.3d at 470.

Two categories of factors are used in determining whether a consent is voluntary. The first category involves the characteristics of the person giving consent, including:

> (1) their age; (2) their general intelligence and education; (3) whether they were intoxicated or under the influence of drugs when consenting; (4) whether they consented after being informed of their right to withhold consent or their Miranda rights; and (5) whether, because they had been previously arrested, they were aware of the protections afforded to suspected criminals by the legal system.

United States v. Bradley, 234 F.3d 363, 366 (8th Cir. 2000), rehearing en banc denied (citing *United States v. Chaidez*, 906 F.2d 377, 381 (8th Cir. 1990). The second category of factors which are to be considered in determining whether consent was voluntarily focus on the environment in which consent was allegedly given, and include:

> whether the person who consented (1) was detained and questioned for a long or short time; (2) was threatened, physically intimidated, or punished by the police; (3) relied upon promises or misrepresentations made by the police; (4) was in custody or under arrest when the consent was given; (5) was in a public or a secluded place; or (6) either objected to the search or stood by silently while the search occurred.

Bradley, 234 F.3d at 366 (citations omitted). No single individual or environmental factor is controlling, and these factors are not to be applied mechanically, as the underlying question for the Court to determine always is whether the totality of circumstances indicates that consent was voluntarily given to law enforcement. *Id.*

In this case, the government has asserted that it had Stewart's consent to search his apartment, and it submitted into evidence at the hearing a copy of a "Consent to Search" form which Stewart allegedly signed on Ocotber 23, 1999. The Court is disturbed by the fact that Officer Ortman shredded the original "Consent to Search" form. The Court does not have reason to question the sincerity of Officer Ortman's explanation for why he shredded the document –

that he thought he did not need the original because of the new "paperless" system – nor does it question Officer Ortman's credibility on this issue. Regardless, the pertinent fact is that the original document was shredded by a law enforcement officer and not presented to this Court. While such a form is not necessary to show that Stewart actually gave his consent, or that the officers reasonably believed Stewart was consenting to a search of his apartment, the existence of such a form would have strongly corroborated law enforcement's testimony that Stewart consented to the search of his apartment. *See, e.g., Zamoran-Coronel*, 231 F.3d at 470 (stating that a signed written consent to search form corroborated the consent defendant gave law enforcement verbally and by her actions). Furthermore, the fact that a handwriting analysis could not be performed on the remaining copy of the "Consent to Search" form does not help the government to meet its burden and show, by a preponderance of the evidence, that Stewart voluntarily consented to the search or that law enforcement reasonably believed he consented.

The failure of the government to submit a confirmed and signed original "Consent to Search" form, by itself, is not determinative of the consent issue. The Court recognizes its duty to inspect the individual and environmental factors, and consider the totality of the circumstances.

The record before this Court discloses very little about Stewart's individual characteristics. Stewart does not appear to argue there is anything about him that makes him more susceptible to law enforcement coercion, or law enforcement's tactics in securing the consent of suspects. After observing Stewart at the hearing, the Court finds he is an English speaking adult who appeared intelligent and well mannered, and would therefore not have had a problem understanding law enforcement's request to consent. There is nothing in the record

to indicate that law enforcement informed Stewart of his right to refuse consent, and the Court is not aware that he has previous experience with the judicial system, in which he would necessarily be aware of his right to refuse consent. Therefore, Stewart's individual characteristics are neutral in determining whether he gave consent, or whether officers reasonably believed Stewart consented, to the search of apartment five.

The record does contain important details about the *environment* in which consent was allegedly given, however. Stewart was detained by having a "gun shoved in his face" by an officer executing a search warrant on apartment four, and he was detained for a long period of time. By all accounts at the hearing, Stewart was detained for more than three hours in either the doorway to his apartment or in apartment four before consent to search his apartment was sought. He was face down on the floor, while handcuffed, for a period of time. The Court also finds credible Stewart's testimony that he was handcuffed the entire time he was detained in apartment four,[4] including while he signed a document that he thought acknowledged the officers were confiscating the belongings that were on his person.

The record indicates that, initially, the officers rightfully entered Stewart's apartment for safety reasons while simultaneously gaining access to apartment four. However, the record also

---

[4] The criminalist who prepared the DCI report, Gary A. Licht, made a statement that this Court finds relevant to the issue now before it. Licht stated: "The image of the questioned signature has the appearance of not having been freely and naturally written." *See* Defendant's Exhibit A. Despite the fact that a handwriting analysis could not be performed, the Court is willing to assume that the signature which appears on the copy of the "Consent to Search" form indeed is Stewart's. This finding is consistent with Stewart's admission that he did sign a document on October 23, 1999 relating to his personal property. Licht's statement in the report appears to corroborate testimony at the hearing that Stewart was handcuffed throughout the course of the evening, because if that is his signature, the fact that it was not "freely and naturally written" is consistent with wearing handcuffs. It appears likely that Stewart signed the form after having been detained and handcuffed for more than three hours, and was handcuffed at the time he signed the form.

indicates that this door remained open and that officers entered it on more than one occasion[5] before requesting his consent. The government has not alleged that at some point they gained probable cause to search apartment five, but merely assert they had consent or a reasonable belief of consent from Stewart. This consent would have come more than three hours after initial detention, and after Stewart had been detained by the officers and handcuffed. Stewart had seen officers already go in and out of his apartment, as the door was open when officers arrived.

This is not a case where defendant voluntarily opened the door to his apartment for law enforcement, and is now claiming he didn't consent to the search voluntarily. *See United States v. White*, 81 F.3d 775, 780 (8th Cir. 1996) (finding consent was voluntary where defendant opened the trunk of his vehicle for law enforcement). Stewart opened his door when he heard a noise in the hallway of the apartment building he both lived in and managed. Stewart was then subjected to an environment where a search warrant was being executed. Stewart did not voluntarily open his door to law enforcement.

The Court finds that the totality of the circumstances indicate Stewart did not give consent, and law enforcement did not have a reasonable belief that Stewart consented to the search of his apartment. Stewart was in a coercive environment where law enforcement were executing a search warrant. The government has not carried its burden to show that Stewart freely and voluntarily consented to the search of his apartment, or officers reasonably believed they had Stewart's consent, by a preponderance of the evidence.

---

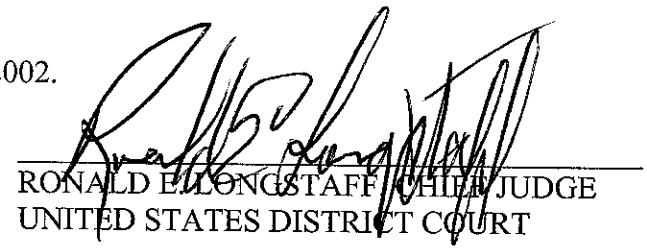
[5] The Court finds credible Stewart's testimony that officers stepped over him as they entered and exited apartment five.

III. CONCLUSION

For the above stated reasons, Stewart's motion to suppress is granted as the consent search of his apartment at 1104 25th Street, apartment five, was in violation of his rights under the Fourth Amendment to the United States Constitution. Evidence taken from this apartment, directly or indirectly, is suppressed and shall not be presented at trial.

IT IS SO ORDERED.

Dated this 19th day of February, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT