

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)
)
 v.) Crim. No. 00-421-A
)
 WILLIAM KINJO SMITH)
)
 Defendant)

MOTION TO SUPPRESS

COMES NOW Defendant, by counsel, and moves this court, pursuant to Fed. R. Crim. Pro. 41, to suppress as evidence items seized from Defendant's apartment on July 7, 2000.

Defendant is charged in a three count indictment, Count 2 of which charges him with possession of firearms after having been convicted of six (6) felonies, in violation of 18 U.S.C. § 922(g)(1) and § 924(e)(1); Count 3 charges him with possession of an unregistered destructive device. The items which are the basis of Counts 2 and 3 were seized by City of Alexandria police officers on July 7, 2000, pursuant to a warrant issued by a magistrate, and turned over the agents of the Bureau of Alcohol, Tobacco & Firearms (BATF).

Background

According to Alexandria Police Officer Harold Duquette, he was "dispatched to 4600 Duke Street to locate Michael Smith." Supplement 2. He and Officers Blanchet and Grossman checked the building to locate Mr. Smith. After being informed that Mr. Smith resided in apartment #1625 and confirming that Mr. Smith's vehicle was in the garage, the officers left the building and met with other officers and supervisors. Another officer, Officer McCredy,

was informed by telephone by Captain Corle that the magistrate "was going to issue warrants for Burglary, two counts of Abduction and Destruction of Property against Mr. Smith." Supplement 2. Captain Corle and Officers Duquette, Fridley, Blanchet, and Grossman returned to 4600 Duke Street and "entered the building to place Mr. Smith under arrest" for the above offenses. Supplement 2. On the 16th floor, "Captain Corle spoke to Mr. Smith for 20 minutes" Mr. Smith "opened the door approximately 24 inches" and "handed a round green hand grenade to Captain Corle" The officers then "walked into the apartment and placed Mr. Smith under arrest." Supplement 3. Officer Duquette "checked the apartment for other persons" He:

entered the bedroom on the right side of the hall entrance and found the bed covered with automatic weapons, loaded with additional ammunition and gas masks. There was a walk in closet off the bedroom. In the closet were additional weapons and ammo. I was not checking for weapons at the time, only for additional persons in the apartment.

Supplement 3.¹

When Captain Corle sought Mr. Smith's permission to search the apartment, "Mr. Smith refused." Supplement 3. "Mr. Smith was then removed from the apartment and officers secured the front door." Supplement 3. Officer Duquette "returned to the Alexandria Police Department to obtain a search warrant for Possession of handgun by a Convicted Felon." Supplement 3.

According to the affidavit for the search warrant, when Officer Duquette entered Mr. Smith's apartment, he:

¹ The bedroom was on the left side of the hallway from the entrance and not visible from the room where Mr. Smith was arrested.

observed several automatic weapons to include pistols and a sub-machinegun type weapon. Your affiant observed numerous filled ammunition magazines to include "clips" that were taped together that appeared to fit the weapons. The weapons were on display in the bedroom of apartment 1625 Your affiant was further advised that Smith was a convicted felon. With this verified information, your affiant believes that the seizure of any and all mentioned firearms and munitions observed in the apartment will constitute further evidence of a felony, to wit: Possession of Firearm by Convicted Felon under Va code 18.2-308.2. (emphasis added).

Affidavit of Officer Harold D. Duquette, APD

The magistrate issued a search warrant to search for "Firearms and munitions to include hand guns, rifles, bullets, hand grenades and any type of firearms."

Accompanied by BATF Special Agent Castro and others, Officer Duquette executed the search warrant. Special Agent Castro "took possession of the following items for disposal. Flares, smoke grenades, simulator trip explosives, Ignitor fuses for grenades and other similar devices. Special Agent Castro also recorded down the serial numbers from the guns located inside the apartment." Supplement 4. Officer Duquette seized the firearms.

Argument

The items seized should be suppressed as evidence on two independent grounds: 1) that the arrest of Mr. Smith was made without a warrant and thus the seizure of any items pursuant to the searches following that arrest were unlawful; and 2) that the search of Mr. Smith's apartment when he was arrested ("initial search") was unlawful and thus the seizure of any items pursuant to the search warrant obtained on the basis of the initial search was unlawful.

1) In Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980),

the Court held:

the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

445 U.S. at 590, 100 S.Ct. at 1382.

In the case at bar, Mr. Smith was in his home and the officers did not have an arrest warrant. Thus, as no exigent circumstances appear, the entry into Mr. Smith's apartment was unlawful. It follows that the search of his apartment following his arrest was unlawful and that any observations made therein could not provide the basis for a search warrant. Segura v. United States, 468 U.S. 796, 814-15 (1984). As the affidavit for the search warrant here expressly states that it was based upon "firearms and munitions observed in the apartment," the warrant here was invalid and the items seized thereunder must be suppressed.

2) In Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990), the Court held:

[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. . . . We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.


494 U.S. 334-36, 110 S.Ct. at 1098-99.

In the case at bar, the firearms and munitions were found in the bedroom, which was not "immediately adjoining the place of arrest" ² Thus, for Officer Duquette's search to have been lawful, there must have been "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Officer Duquette's Supplement does not reveal that he had any belief that there was another person in the apartment, let alone articulable facts which would have warranted him in believing that the bedroom harbored an individual posing a danger to those on the arrest scene. As a result, Officer Duquette's observation of the bedroom was unlawful and those observations could not provide the basis for a search warrant. Segura v. United States, 468 U.S. 796, 814-15 (1984). As the affidavit for the search warrant here expressly states that it was based upon "firearms and munitions observed in the apartment," the warrant here was invalid and the items seized thereunder must be suppressed.

² In Buie, the Court noted that, once Buie was found, "there was no longer that particular justification for entering any rooms that had not yet been searched." 494 U.S. at 333, 110 S.Ct. at 1097. Moreover, Buie's expectation of privacy in the "remaining areas of his house" did not mean that "such rooms were immune from entry." Id. But, as to those rooms, the Court applied the reasoning of its holdings in Terry v. Ohio and Michigan v. Long, which required that, for a patdown search, there be specific and articulable facts from which a reasonably prudent officer would be warranted in the belief that a person was armed and dangerous. Finally, the Court rejected the State's contention that "entering rooms not examined prior to the arrest is a *de minimis* intrusion that may be disregarded." 494 U.S. at 334, 110 S.Ct. at 1098. In short, other rooms in a residence were not understood by the Court to be "other spaces immediately adjoining the place of arrest" Id.

Respectfully submitted,

William Kinjo Smith
By Counsel

A handwritten signature in cursive script, reading "Richard E. Gardiner". The signature is written in dark ink and is positioned above a horizontal line.

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(703) 359-0938 (fax)



Supplement

Alexandria Police Dept.	<input type="checkbox"/> Original <input checked="" type="checkbox"/> Supplement	Case No. 00-052117
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Original Offense Poss. Of Firearm by a Convicted Felon	Original Complainant's Name Duquette, Harold	Date of report 07-08-2000
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NARRATIVE

I was dispatched to 4600 Duke Street to locate Michael Smith. The following persons assisted on the call. Captain. B. Corle, Officers, E. Fridley, B. Blanchet, and M. Grossman. Officer's Grossman, Blanchet and myself checked the 10th and 16th floors and could not locate the suspect. We were advised that Mr. Smith was seen walking on the 10th floor, he lives in apartment # 1625 and he has a vehicle in the garage. A condominium manager confirmed that Mr. Smith (01-S) lived in apartment #1625 and his maroon Ford was parked in space P-52 of the underground garage. I walked to the second level and located the vehicle, a 1989 maroon Ford Taurus bearing Virginia Tags ZFK-1738. The vehicle had six antennas which included the AM/FM antenna. I could see inside that there were several mobile radio control panels on the front dash area by Motorola. Information was received that Mr. Smith monitors all Alexandria radio frequencies.

We left the building to meet up across from the complex with the supervisors and other officers. Officer McCredy made contact with Captain Blain Corle via a telephone that the magistrate was going to issue warrants for Burglary, two counts of Abduction and Destruction of Property against Mr. Smith. This information was not given over the police radios because we had information that Mr. Smith was monitoring our frequencies.

Captain Corle gave instructions to Officer McCredy to say over the radio that Ms. Campbell was not going to prosecute and no warrants were going to be issued by the magistrate in case Mr. Smith was listing to our radio transmissions. Captain Corle, Officer's Fridley, Blanchet, Grossman and I drove back to the front parking lot of 4600 Duke Street and we entered the building to place Mr. Smith under arrest for the offenses in case 00-052062. We went to the 16th floor and Cpt. Corle contacted the suspect by telephone. Captain Corle spoke to Mr. Smith for 20 minutes and stated we needed to check him for his safety. We wanted to make sure that he had not hurt himself. If he came out of his apartment, we would check him for injuries and then leave. Mr. Smith was concerned that SWAT members were waiting outside his door to arrest him. Captain Corle assured Mr. Smith that SWAT members do not call or knock on doors before they enter apartments. We were only there to check on his safety.

Corrected Offense	Corrected Complainant
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<input type="checkbox"/> Basis for Exceptional <input type="checkbox"/> Juvenile, no custody <input type="checkbox"/> Claim of suspect	<input type="checkbox"/> Refused to cooperate <input type="checkbox"/> Prosecution declined <input type="checkbox"/> Extradition declined	Status <input type="checkbox"/> Open <input type="checkbox"/> Pending <input type="checkbox"/> Terminated <input type="checkbox"/> Archived <input type="checkbox"/> Closed	<input type="checkbox"/> Arrest <input type="checkbox"/> Unfounded <input type="checkbox"/> Exceptional	Dist	Rev
Officer	Supervisor	Subervisor	Supervisor	Page	



Supplement

Alexandria Police Dept.	<input type="checkbox"/> Original <input checked="" type="checkbox"/> Supplement	Case No. 00-052117
Original Offense Poss. Of Firearm by a Convicted Felon	Original Complainant's Name Duquette, Harold	Date of report 07-08-2000

NARRATIVE

Mr. Smith agreed to exit his apartment so we could talk to him. Officer Grossman had a shield and he covered the apartment door incase Mr. Smith exited with a weapon. We also received information that Mr. Smith had several guns in the apartment to include a hand grande. Captain Corle stood on the left side of the door, I stood on the right side of the door and Grossman stood to my left with Officer Fridley. Mr. Smith was moving items away from the front door and he opened the door approximately 24 inches. Mr. Smith then handed a round green hand grenade to Captain Corle and Captain Corle then gave it to me. We walked into the apartment and placed Mr. Smith under arrest.

I checked the apartment for other persons and noticed the following things. Mr. Smith's had (2) two large blue 50 gallon plastic water containers at the front door along with (3) three 5 1/4 gallon containers of Kerosene. There was a large box with food also placed next to the front door. The two water containers had to be move to open the front door. I walked into the kitchen on the left side the apartment. There was a portable radio on the kitchen counter that was monitoring all of the Alexandria Police radio frequencies. The large window in the living room faced the Fox Chase Shopping center parking lot and there was a camera mounted on a tri-pod. There was a small den to the right of the living room which was the computer/radio room. There were computers and radio scanners in operation. I entered the bedroom on the right side of the hall entrance and found the bed covered with automatic weapons, loaded with additional ammunition and gas masks. There was a walk in closet off the bedroom. In the closet were additional weapons and ammo. I was not checking for weapons at the time, only additional persons in the apartment.

Captain Corle asked Mr. Smith if he would give us permission to search his apartment and Mr. Smith refused. Mr. Smith would only allow a search of his apartment with a search warrant. Mr. Smith was then removed from the apartment and officers secured the front door. I returned to the Alexandria Police Department to obtain a search warrant for Possession of a handgun by a Convicted Felon. We had confirmed prior to arriving in the apartment that Mr. Smith was a convicted felon and he was not allowed to possess handguns.

Corrected Offense	Corrected Complainant		
<input type="checkbox"/> Basis for Exceptional <input type="checkbox"/> Juvenile, no custody <input type="checkbox"/> Death of suspect	<input type="checkbox"/> Refused to cooperate <input type="checkbox"/> Prosecution declined <input type="checkbox"/> Sanction declined	Status <input type="checkbox"/> Open <input type="checkbox"/> Pending <input type="checkbox"/> Dismissed	<input type="checkbox"/> Arrest <input type="checkbox"/> Unfounded <input type="checkbox"/> Escaped <input type="checkbox"/> Other
Officer	Serial	Dist	Page
H. Duquette	11	11	1



Supplement

Alexandria Police Dept.	<input type="checkbox"/> Original <input checked="" type="checkbox"/> Supplement	Case No. 00-052117
Original Offense Poss. Of Firearm by a Convicted Felon	Original Complainant's Name Duquette, Harold	Date of report 07-08-2000

NARRATIVE

I responded to the Criminal Investigation Section to obtain assistance in preparing a search warrant. Detective Wayne Smith assisted me in preparation of the affidavit for the search warrant. I responded to the Magistrate's office on July 7, 2000 at 2:15 p.m. Magistrate Willard issued the search warrant for 4600 Duke Street, apartment #1625 at 2:28 p.m.

I notified Captain Corle via the radio that I had a signed search warrant in hand. The following persons were waiting outside the apartment to assist in the search. The Army DOD Bomb Squad, Special Agent Vic Castro of the Bureau of Alcohol, Tobacco & Firearms, a warden from the Alexandria Animal Shelter, Code Enforcement officials, Det. Milito of the Alexandria Police Vice/Narcotics Unit and J. H. Williams of our Communications Section.

The members of the Army bomb squad checked the apartment first to confirm that there were no explosive devices set to explode if items were tampered with. The three member team did a quick check and were called off for a suspicious package in another jurisdiction. The animal warden on duty entered the apartment to take possession of a cat that was loose in the apartment. The animal warden later returned to the apartment to remove fish from three tanks in the apartment. The code enforcement unit was going to padlock the apartment because it was unsafe. Mr. Quentin Tabscott of the Code Enforcement Bureau removed the (3) 5 1'2 gallon containers of Kerosene from the front door. The liquid was turned over to the Solid Waist Division for safe keeping. Mr. Tabscott also removed 12 containers of Coleman propane containers from the front door. Special Agent Vic Castro of AFT took possession of the following items for disposal. Flares, smoke grenades, simulator trip explosives, Ignitor fuses for grenades and other similar devices. Special Agent Castro also recorded down the serial numbers from the guns located inside the apartment.

I then completed a search of the apartment. The search was started around 3:00 p.m. and was not completed until 7:12 p.m. All the items were placed in boxes and marked where they were located. The items were then placed in a secured police van which I had the key only to. I stayed with the evidence from the point of collection and until all the items were turned into the property room by 1:00 a.m on July 8, 2000.

Corrected Offense

Corrected Complainant

Basis for Exceptional

Juvenile, no custody

Death of suspect

Refused to cooperate

Prosecution declined

Extremist required

Status

Open

Pending

Terminated

Withdrawn

Archived

Arrest

Unfounded

Exceptional

Expedient

Expedient

Dist

Rev

Officer

Serial

Unit

Officer's Approval Initials

H. Duquette

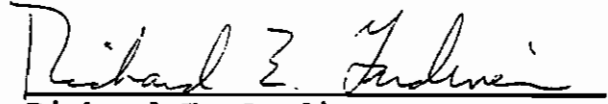
07-08-2000

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO SUPPRESS was hand-delivered to Michael Rich, Assistant United States Attorney, 2100 Jamieson Avenue, Alexandria, VA 22314 this 17th day of January, 2001.


Richard E. Gardiner

Richard E. Gardiner