

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA

v.

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MOTION TO SUPPRESS

Introduction

The Defendant, by and through undersigned counsel, hereby moves, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(c), to suppress any and all evidence, including specifically cocaine base "crack" and a Lorcin 9mm semiautomatic pistol, seized from his residence on May 21, 2008, by officers of the [REDACTED] North Carolina, Police Department. The basis for this motion is that the evidence was seized in violation of the Fourth Amendment to the United States Constitution.

Facts

On May 21, 2008, officers with the [REDACTED], North Carolina, Police Department received a tip that the Defendant was driving and in possession of cocaine. Officers confirmed that the Defendant's driver's license had been revoked and, while following up on the tip, saw him driving a green Oldsmobile. Just after he stopped at his residence, [REDACTED], North Carolina, the officers arrested the Defendant for driving with a revoked license.

Because of the earlier tip, officers asked the Defendant about drugs, and asked to search his residence. According to the officers' reports, the Defendant responded by repeatedly stating that he did not have a key to the residence. However, officers discovered such a key during their search of the Defendant incident to his arrest for driving with a revoked license. According to the officers' reports, after they confirmed that the key was for the residence, the Defendant asked to use the bathroom, they replied that they would first have to do a protective sweep of the house, and the Defendant agreed. The officers report that after the sweep they took the Defendant inside his residence to the bathroom, but that once there, he explained that he did not really need to use the bathroom, but instead wanted to speak with them in private. Officers claim that the Defendant told them his roommate had some "stuff," which they understood to mean drugs, in the house. Officer [REDACTED] reports that "[REDACTED] was advised that he could either give us consent to search the residence or an application for a search warrant would be applied for [sic]." According to the officers' reports, the Defendant gave verbal consent to a search of the residence, and then signed a written consent form. However, the officers report that they misplaced that form, and it was never found.

The police officers' subsequent search of the Defendant's residence yielded the cocaine base "crack" and Lorcin 9mm firearm

which are the subject of this motion to suppress.

#### Law and Argument

The law is clear that consent is an exception to the Fourth Amendment warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Hummer*, 916 F.2d 186, 189 (4<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 970 (1991). The law is also clear that the government bears the burden of proving that consent is voluntary, by a preponderance of the evidence, based on the totality of the circumstances. *Hummer*, 916 F.2d at 189 (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) and *Schneckloth*, 412 U.S. at 248-49); *United States v. Elie*, 111 F.3d 1135, 1144 (4<sup>th</sup> Cir. 1997). Those circumstances include, *inter alia*, "the characteristics of the accused (such as age, maturity, education, intelligence, and experience) as well as the conditions under which the consent to search was given (such as the officer's conduct; the number of officers present; and the duration, location and time of the encounter)." *Elie*, 111 F.3d at 1144 (quoting *United States v. Lattimore*, 87 F.3d 647, 650 (4<sup>th</sup> Cir. 1996)). It is not required that an accused be advised of the right to refuse consent, but the presence or absence of such advice is a factor to consider in assessing the validity of the consent. *Elie*, 111 F.3d at 1146. The same is true regarding *Miranda* warnings. *Id.* Finally, valid consent must be more than mere acquiescence to authority. *Bumper*, 391 U.S. at 548. In that regard, "[t]he fact that a search warrant

was mentioned does not necessarily constitute a coercive factor negating consent." *Hummer*, 916 F.2d at 190 (citations and internal quotation marks omitted). However, a threat to seek a search warrant is a factor to consider in assessing the voluntariness of the consent. *Id.*<sup>1</sup>

In this case, the government cannot meet its burden of establishing voluntary consent. The Defendant, already under arrest, was greatly outnumbered by armed police officers. His initial protestations that he did not have a key to the residence, while not accurate, certainly indicate a desire on the Defendant's part that officers not search his residence. The officers' acts in checking to see whether the key unlocked the residence, and their later threat to apply for a search warrant, only reinforced the Defendant's perception that they were going to search his residence, one way or the other, no matter what he said. Finally, the absence of the written consent form the officers say the Defendant signed significantly undermines the government's position. Overall, the totality of the circumstances do not establish voluntary consent on the part of the Defendant.

#### Conclusion

For all these reasons, any and all evidence, including specifically cocaine base "crack" and a Lorcin 9mm semiautomatic

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<sup>1</sup> See also Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 8.2(c) (4<sup>th</sup> Ed. 2004)

pistol, seized from the Defendant's residence on [REDACTED], by officers of the [REDACTED], North Carolina, Police Department. should be suppressed.

Respectfully submitted this the 30<sup>th</sup> day of [REDACTED]

[REDACTED]  
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Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on [REDACTED], I electronically filed the foregoing Motion to Suppress with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Mr. [REDACTED], Assistant United States Attorney, 251 North Main Street, Winston-Salem, North Carolina 27101.

Respectfully submitted,

/s/ [REDACTED]

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