UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. Number
	)	
DARIO GIAMBRO	)	

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, Dario Giambro, by and through counsel, Peter E. Rodway, and for his motion to suppress evidence, states as follows:

ANTICIPATED FACTS

On February 10, 2006, Officer Moen of the Auburn Police Department applied for and was issued a search warrant for the premises of Dario Giambro in Auburn, Maine. Copies of the affidavit for search warrant and the warrant itself are attached hereto. During the search of the premises, the firearm, a Marbles Game Getter, (hereinafter referred to as "Game Getter") that is the subject of the charge against Mr. Giambro, was located and seized.

Prior to obtaining the warrant, agents of the ATF and officers of the Auburn Police Department responded to Mr. Giambro's address in response to a report that a shooting had occurred at that location.

At about 8:00 P.M., without a warrant and without consent, various police officers entered Mr. Giambro's home. Once inside the home, officers broke open one of the bedroom doors and searched the room. Inside the room were several firearms. Prior to entering Mr. Giambro's home, Mr. Giambro, without probable cause, was arrested and,

allegedly, read the Miranda warning. Mr. Giambro did not waive his Miranda rights and asked to speak to an attorney. Undaunted by Mr. Giambro's invocation of his Miranda rights, the police interrogated him. Mr. Giambro allegedly made several incriminating statements, including acknowledging that he had several firearms in his residence. The police searched the house prior to obtaining a warrant. Several firearms were observed in the house during the warrantless search.

At 12:51 A.M., Officer Moen applied for a search warrant. Included in the search warrant affidavit was that Mr. Giambro was advised of his Miranda rights and agreed to waive those rights and answer questions. The affidavit alleges that Mr. Giambro admitted to shooting Richard McClain but claimed that the shooting was an accident and that the discharge of the firearm was meant to scare Mr. McClain off of his property. Officer Moen went on in his affidavit to tell the magistrate that the residence was secured. He fails to tell the magistrate that the residence was secured by breaking a door down and entering the premises without the consent of the inhabitants of the residence. Moreover, the affidavit fails to tell the magistrate that the officers searched the house, without consent, before obtaining a warrant. Finally, the affidavit fails to inform the magistrate that Mr. Giambro had been held, and had his house occupied by the police, for more than four hours by the time that a warrant was applied for.

A search warrant was issued. The warrant authorized the police to search for "Any firearms, ammunition, shell casings, blood stains, blood stained clothing or other items that represent evidence of a shooting."[1] After receiving the warrant, the police searched the house, including a room containing a number of antique and collectable

[1] The report from the alleged victim indicated that he was shot with a handgun.

firearms, and, allegedly found the Marbles Game Getter firearm.[2] Inexplicably, despite the fact that the officers were searching for a handgun that was allegedly used in the shooting, and despite the fact that the warrant only authorized the search for and seizure of "items that represent evidence of a shooting," the police searched several long gun cases that contained rifles and shotguns, and seized several long guns, including the Game Getter.

ARGUMENT I: THE INFORMATION CONTAINED IN THE AFFIDAVIT FOR SEARCH WARRANT PERTAINING TO THE DISCOVERY OF INCRIMINATING EVIDENCE AT DEFENDANT'S RESIDENCE PRIOR TO THE SEARCH WARRANT BEING ISSUED WAS ILLEGALLY OBTAINED. THEREFORE, IT CANNOT BE CONSIDERED BY THIS COURT IN ITS REVIEW OF THE AFFIDAVIT FOR SEARCH WARRANT AND MUST BE EXCLUDED FROM EVIDENCE DURING THE TRIAL OF THIS MATTER

The United States constitution prohibits unreasonable searches and seizures in the homes of our people. Warrantless searches are *per se* unreasonable, subject to a few specifically established, carefully drawn and much guarded exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). Warrantless entries into private homes for purposes of search, or arrest for that matter, are equally unreasonable, except in those circumstances wherein an exception to the warrant requirement have been carefully drawn and guarded. *See Payton v. New York*, 445 U.S. 573, 576 (1980), where the United States Supreme Court held that "the fourth amendment … prohibits the police from making a warrantless and nonconsensual entry into a suspects home in order to make a routine felony arrest."

Evidence obtained illegally must be excluded from evidence during trial. *Mapp v. Ohio,* 367 U.S. 643 (1961). Evidence obtained illegally must also be excised from an affidavit for search warrant. *Murray v. United States*, 487 U.S. 533 (1988); *Silverthorne*

[2] The Marbles Game Getter is not a handgun. It is a combination rifle and shotgun and does not resemble a

Lumber Co. v. United States, 251 U.S. 385 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all.") Thus, when the Court reviews the affidavit, it must extract the information that was obtained during the illegal entry and search of the residence, and as a result of the illegal arrest of Mr. Giambro, and then determine if the affidavit is sufficient to show probable cause that evidence of the shooting was present on the property or in the residence of Mr. Giambro on February 10, 2006. If the affidavit is then found to be insufficient to support a finding of probable cause, the evidence allegedly found during the search pursuant to the warrant must be excluded from evidence during the trial of this matter. Likewise any evidence found during the warrantless search must be excluded from evidence during the trial of this matter. *Mapp v. Ohio,* Supra.

In this case, the evidence that was found pursuant to the illegal entry and search, and the illegal arrest of Mr. Giambro was the identity of Mr. Giambro, his presence at the house, his statements concerning the shooting, Arline Giambro's statements that the room where the guns were found was Mr. Giambro's bedroom, his statements evidencing knowledge of the firearms in the house, and the Game Getter itself.

ARGUMENT II: THE DEFENSE IS ENTITLED TO A *FRANKS* HEARING

A basis, in addition to the issues raised in previous section, for challenging the search warrant evidence is generated by the affidavits of Mr. Giambro, Mrs. Giambro and the report of Officer Moen.

A defendant may challenge the validity of a search warrant by making a substantial preliminary showing that a false statement was included in the affidavit,

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handgun in any respect.

knowingly, intentionally, or with reckless disregard for the truth. *See, Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *United States v. Mastroianni*, 749 F.2d 900, 909 (1st Cir. 1984). Reckless or deliberate omissions from search warrant affidavits have also been held to be challengeable in a number of circuits, *See, United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir. 1995); *United States v. Lucht*, 18 F.3d 541, 546-47 (8th Cir. 1994); *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), including the First Circuit. *United States v. Parcels of Land*, 903 F.2d 36, 46 (1st Cir. 1990). At the preliminary showing stage, the defense must allege falsity, and that the falsity was either deliberate or resulted from reckless disregard for the truth. *Franks* at 171. The second prong of the *Franks* analysis is that the challenged statements are necessary to the finding of probable cause. *Id.* at 156.

Once a substantial preliminary showing of false statement or omission is made by the defense, if the challenged statement is necessary to support probable cause for the search, the Court must hold an evidentiary hearing on the matter. *Franks*, 438 U.S. at 171-72. If, at the evidentiary hearing, the defendant proves by a preponderance of the evidence that a false statement was knowingly or recklessly made in the affidavit, the false material must be set aside and, if the affidavit, without the false material does not support a finding of probable cause, any evidence seized pursuant to the warrant must be suppressed. *Id.* at 155-56.

In his affidavit, Officer Moen tells the issuing judge that (1) Mr. Giambro admitted that he shot Richard McClain, and (2) Mr. Giambro waived his Miranda rights and agreed to answer questions. (see paragraph 5 of the affidavit for search warrant) According to the affidavit of Mr. Giambro and the report of Officer Moen, he did not

waive Miranda, did not agree to answer questions, and, in fact, invoked his right to have counsel present during questioning.

Paragraph 3 of the affidavit tells that the residence was "secured." The affidavit fails to inform the magistrate that the house was entered, without the consent of the inhabitants, and that once inside, a bedroom door was broken in to gain entry. Paragraph 3 goes on to say that Mrs. Giambro consented to the protective sweep of the residence. Mrs. Giambro's affidavit and the reports of Officers Syphers and Laliberte show that Mrs. Giambro did not consent to a protective sweep of the premises. The affidavits, incorporated herein by reference, constitutes a substantial preliminary showing as required by *Franks,* of false statements and omissions in that they present evidence that is inconsistent with the information contained in the affidavit.

The second issue is whether the false statements and omissions were necessary to a finding of probable cause. In this case, without the challenged statements and with the omissions, the Court would have no evidence whatsoever from which it could conclude that there was probable cause to believe that there would be items "that represent evidence of a shooting" in the house that night.

ARGUMENT III: THE INFORMATION CONTAINED WITHIN THE FOUR CORNERS OF THE AFFIDAVIT WAS NOT SUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE

The affidavit for search warrant, once the fruits of the aforementioned illegal search are excised, and once the false statements are excised, contains no information from which the magistrate was justified in finding probable cause. The only information left after excising the fruits of the illegal search and the false statements, is the statement of a trespasser and thief, Richard McClaran, who stated that he was shot by Mr. Giambro.

No information is provided concerning the reliability of the information provided by Mr. McClaran. The United States Supreme Court in *Illinois v. Gates*, 76 L.Ed 2d 527 (1983) described the respective roles of the search warrant issuing magistrate and the reviewing court as follows:

> "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is to ensure that the magistrate had a "substantial basis for concluding" that probable cause existed." *Id*.

In essence, the magistrate must be presented with information from which he can determine that the statements of the informant are reliable. As the Court in *Gates* admonished:

> > "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Id.

Here, without information concerning the reliability of Mr. McClaran, there is simply not enough information to support a finding of probable cause for the search of the house.

ARGUMENT IV: THE INITIAL ARREST OF GIAMBRO WAS WITHOUT PROBABLE CAUSE.

A person is under arrest when there exists a restraint on his movement of the degree associated with formal arrest. *Stansbury v. California*, 511 U.S. 318, 321 (1994). From the time that Giambro was handcuffed, he was under arrest. C.f. *United States v. Barlow*, 839 F.Supp. 63 (D. Me. 1993). See also *Orozco v. Texa*s, 394 U.S. 324, 325-26

(1969); *United States v. Madoch*, 149 F.3d 596, 600-01(7th Cir. 1998); *United States v. Griffin*, 922 F.2d 1343, 1346 (8th Cir. 1990).

In order for an arrest to be consistent with the Fourth Amendment to the United States Constitution, and therefore lawful, it must be supported by probable cause. Probable cause to arrest exists when police have, at the moment of arrest, knowledge of facts and circumstances grounded in reasonably trustworthy information and sufficient in themselves to warrant a belief by a reasonably prudent person that an offense has been or is being committed by the person to be arrested. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). In this case, from the time that the police handcuffed Mr. Giambro, until the time that the Game Getter was found in his house, there was no probable cause to arrest him, yet, as discussed above, he was under arrest. As a result of his arrest, the police were able to gather evidence that the government intends to use against him during the trial of this matter. That evidence is: (1) his presence at the house; (2) his statement that he lived at the house; (3) his statement that he knew that there were guns in the house; and (4) the Game Getter. Evidence gathered in violation of the Fourth Amendment may not be used against the defendant at trial. *Weeks v. United States*, 232 U.S. 383, 398 (1914). Therefore, any and all evidence gathered as a result of Giambro's unlawful arrest should be excluded from evidence during the trial of this matter. *Wong Sun v. United States*, 371 U.S. 471 (1963).

ARGUMENT V: THE INTERROGATION OF GIAMBRO WAS WITHOUT WAIVER OF MIRANDA AND AFTER INVOCATION OF MIRANDA RIGHTS.

It is a fundamental principle of criminal procedure that statements made by a

defendant, in response to custodial interrogation, must be excluded from evidence unless the prophylactic measure of advising the defendant of his right to remain silent and his right to have counsel present during questioning has been taken. *Miranda v. Arizona*, 384 U.S. 436 (1966). Not only is evidence gathered illegally not admissible at trial, it is also not admissible to support a claim of probable cause. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920)("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.") Evidence gathered as a result of illegally gathered evidence must also be suppressed as it is tainted by the prior illegality. *Wong Sun v. United States*, 371 U.S. 471 (1963) A person is in custody, for purposes of determining whether *Miranda* warnings are required, when under the circumstances of the interrogation, a reasonable person would not have felt at liberty to terminate the interrogation and leave. *Thomas v. Keohane*, 516 U.S. 99 (1995).

As discussed above, Giambro was in custody when the police handcuffed him.

There is no question that the statements that Giambro allegedly made were in response to interrogation. The police asked Giambro what happened during the incident and that he had other firearms in the residence. This was after the police had already thoroughly searched the house. Accordingly, the statement by Giambro that exhibited his knowledge of the location of the shooting and that there were guns in the house must be suppressed from evidence during the trial of this matter and extracted from the affidavit for search warrant when the affidavit is reviewed by this Court to determine probable cause.

VI: THE STATEMENTS WERE INVOLUNTARY

Involuntary statements violate the rights against self-incrimination of the accused, and standards of due process. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985). Thus, if the Court finds that a statement by an accused is involuntary, it cannot be used at trial. *Colorado v. Connelly*, 479 U.S. 157, 163 (1986). Consent to search given involuntarily renders the search illegal, resulting in the exclusion of the evidence gathered during the search. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

A statement is involuntary if it is extracted by any sort of threats or violence or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence. *Hutto v. Ross*, 429 U.S. 28 (1976). In this case, the police continued to question Giambro after Giambro invoked his Miranda rights, in a custodial setting, without supplying a lawyer for Giambro. The statements were made under extremely coercive circumstances, including the forceful entry into the house by the Police and the handcuffing of Mr. Giambro.

In assessing the voluntariness of statements, the court must ask whether, in the totality of the circumstances, law enforcement officials obtained evidence by overbearing the will of the accused. *Haynes v. Washington*, 373 U.S. 503 (1963). Here, given all of the coercive tactics employed by the police, the alleged statement concerning the presence of the guns in the house and the fruits of the alleged statements, i.e. the Game Getter, must be suppressed from evidence because the alleged statements were involuntary. The Game Getter itself must also be suppressed from evidence as it is the fruit of the involuntary statement. See *Wong Sun*, supra.

VII. THE SEARCH AND SEIZURE OF THE MARBLES GAME GETTER EXCEEDED THE SCOPE OF THE SEARCH WARRANT.

The Fourth Amendment protects individuals against unreasonable searches and seizures, and requires that search warrants "particularly describe the place to be searched and the persons or things to be seized." U.S. Const. amend. IV. In general, if the scope of a search exceeds that permitted by the terms of a valid warrant, the subsequent seizure is unconstitutional. *See Horton v. California,* 496 U.S. 128, 140 (1990); *United States v. Haime,* 165 f.3D 80, 82 (1ST. Cir. 1999).

When officers seize items not specified in the warrant, they exceed the scope of the warrant. *Dale v. Bartels*, 732 F.2d 278, 284-85 (2nd Cir. 1984)(police exceeded scope of warrant by seizing photographs, tape recorder, adding machine, cash, and medical instruments because warrant only authorized seizure of clinical records and methadone tablets); *U.S. v. Robbins*, 21 F.3d 297, 300(8th Cir. 1994)(police exceeded scope of warrant by seizing wallet because warrant only authorized seizure of "documentary evidence of ownership of business, cash receipts, trip records, radio logs, and maintenance records of cabs").

The reason that warrants must state with particularity the place to be searched and the items to be searched for is to prevent general searches. *See Stanford v. Texas*, 379 U.S. 476, 481. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192 .

Searches that exceed the scope of the warrant are unreasonable, triggering the application of the exclusionary rule to any items seized as a result of the police exceeding the scope of the warrant. *U.S. v. Chen*, 979 F.2d 714, 717-19 (9th Cir. 1992)(evidence suppressed when police exceeded scope of warrant by installing 3 surveillance cameras because warrant authorized installation of only one.); *U.S. v. Fuccillo*, 808 F.2d 173, 177-78 (1st Cir. 1987)(evidence suppressed because executing officers exceeded scope of warrant authorizing seizure of women's clothes by seizing 2 racks of men's clothes); *U.S. v. Coleman*, 805 F.2d 474, 483 (3rd Cir. 1986)(evidence suppressed because officers exceeded scope of warrant authorizing seizure of certain financial records by seizing material not included in the warrant); *U.S. v. Schroeder*, 129 F.3d 439, 442 (8th Cir. 1997)(evidence suppressed because officers exceeded scope of warrant by searching trailer adjacent to property indicated in warrant because trailer was distinctly separate from the property described in warrant.); *U.S. v. Foster*, 100 F.3d 846, 849-52 (10th Cir. 1996)(evidence, including items authorized by search warrant, suppressed because police exhibited "flagrant disregard" for warrant's terms by seizing everything of value in suspect's house when warrant authorized seizure of only drugs and 4 guns).

Items found in plain view during an authorized search do not exceed the scope of the warrant. However, in order for the seizure of such items to be reasonable, their criminal character must be immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). See also *Stanley v. Georgia*, 394 U.S. 557, 572 (1969). (obscene videotapes found in plain view suppressed because criminal nature could not be determined by mere inspection).

In this case, the warrant authorized the officers to search for evidence of the shooting. The information possessed by the police at the time of the search was that the shooting was done with a handgun. None of the firearms in that room were evidence of a shooting. Therefore, the search of the various cases, including the case that contained the Game Getter, was beyond the scope of the authorized search.

CONCLUSION

For the reasons and on the theories set forth above, Defendant Giambro requests that this Court enter an Order suppressing from evidence during the trial of this matter, the following:

1. Any observations of police officers that Mr. Giambro was present at 605 Washington Street on February 10, 2006.
2. Any statements made by Mr. Giambro to the police on February 10, 2006.
3. The Game Getter.
4. Any observations of the Game Getter by police.
5. Any firearm or ammunition observed and/or seized by police at 605 Washington Street on February 10, 2006.
6. Any observations by police that firearms and/or ammunition were present at 605 Washington Street on February 10, 2006.

Dated at Portland, Maine this 5th day of July, 2007.

/s/ Peter E. Rodway, Esq.
P.O. Box 874
Portland, Maine 04104
207-773-8449

UNITED STATES DISTRICT

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AFFIDAVIT OF ARLINE GIAMBRO

The affiant, Arline Giambro, being duly sworn, hereby deposes and states as follows:

1. That I am over the age of 18.

2. That I reside at 605 Washington Street, Auburn, Maine.

3. That I make this affidavit based upon my own personal knowledge.

4. That on February 10, 2006, in the evening, I was at home with my Husband, Dario Giambro.

5. At about 8:00 P.M., the police asked my permission to enter my home. I declined to grant permission for the police to enter my home.

Futher the affiant sayeth naught.

Dated at Auburn, Maine this day of July, 2007.

_____
Arline Giambro

ANDROSCOGGIN, ss

Personally appeared before me the above named Arline Giambro, and, being duly sworn, stated that the information contained above is true to the best of her knowledge, information and belief.

Dated:

_____
Notary Public/Attorney at Law