

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

Honorable Lawrence E. Kahn
Case No. [REDACTED]

MEMORANDUM OF LAW IN SUPPORT

The, defendant, [REDACTED] hereby moves the District Court of Northern New York for an order granting a hearing in the above captioned criminal case related to the entry into Steinmetz Homes on May 15, 2004. Further, Mr. [REDACTED] requests the Court suppress the physical evidence and statements taken from him on May 15, 2004 as evidence obtained in violation of the Fourth Amendment.

Statement of Facts

Early Friday morning, on May 15, 2004¹ entry was made to the apartment of [REDACTED] at Steinmetz Homes, Schenectady, New York by members of the Schenectady Police and Sheriffs' Departments. The brother of Ms. Rowe, Mr. [REDACTED], was present at the apartment when it was entered by police officers representing various Schenectady law enforcement agencies. *Exhibit A, Reports of Patrolman Mark Kirker dated May 14, 2004.* Mr. [REDACTED] had been staying with his sister intermittently. Ms. Rowe had left for work earlier that morning.

From police reports provided by the government, it appears the individuals assisting in the "inspection" of the apartment included Schenectady Police Officer Sgt. Art Zampella,

¹ The police reports indicate the activity occurred between 8:15 a.m. and 9:00 a.m.

Patrolmen Bill Gallop, Mark Kirker, Steve Sheldon and Deputy David Leffingwell of the Schenectady Sheriff's K-9 unit. Denise Brucker, tenant investigator, for the Schenectady Municipal Housing Authority was with the officers.

As a result of that entry, a firearm was eventually located.² Mr. [REDACTED] was placed under arrest at or about 8:48 a.m that morning. *Exhibit A*. Subsequently, the officers learned that Mr. [REDACTED] had a prior felony conviction and prosecution was handed over to the U.S. Attorney's Office.

According to the police reports and other pieces of discovery provided thus far, the entry made by the police officers was to "assist[] the Schenectady Municipal Housing Authority conduct an inspection for a lease violation." *Exhibit B, Affidavit of William J. Gallop dated May 14, 2004*.

Argument

The suppression issues in the present case of Mr. [REDACTED] involve three areas for inquiry into whether the entry, search, seizure and use subsequent statement comport with the Constitution and controlling case law. First, the entry into the apartment of Ms. Rowe violated the Fourth Amendment because it was made without a warrant. Second, Mr. [REDACTED] had a right to privacy in the apartment as an overnight guest. Third, no exception to the warrant requirement allows the entry as "reasonable". Lastly, once the illegal entry was made any subsequent seizure of evidence and arrest of Mr. [REDACTED] is invalid subjecting the subsequent statements and tangible evidence to suppression as fruits of the illegal entry, search, and arrest.

² The two affidavits provided by Schenectady Police Officers, David Leffingwell and William Gallop contradict the report filed by Officer Mark Kirker about how and where the firearm was located. *Compare Exhibits A, B and C*.

The home is sacrosanct in the realm of protections provided by the Fourth Amendment right to privacy. See Payton v. New York, 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (The "chief evil" against which the Fourth Amendment protects is the "physical entry of the home."). The Fourth Amendment guarantees the right of the people to be secure in their,... houses, against unreasonable searches and seizures,..." U.S. Const. amend IV. This guarantee requires that searches of the home be reasonable. See Illinois v. Rodriguez, 497 U.S. 177, 185-86, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). The reasonableness requirement generally necessitates a warrant have issued based upon a judicial determination of probable cause prior to entering a home. See Payton, 445 U.S. at 585-86, 100 S.Ct. 1371. There are a few well-defined and carefully circumscribed circumstances in which a warrant will not be required. See Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (discussing exceptions to the warrant requirement).

The present entry, search and subsequent seizure is similar to the entry, seizure of evidence and arrest in *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961). In *Chapman*, the defendant-tenant rented several rooms in a building also occupied by his landlord. The landlord detected a smell he believed was related to the illegal production of alcohol. He called the police and told them they could enter the rooms exclusively used and occupied by the tenant through a bathroom window. Evidence of he illegality was seen and other police officers were let in the rooms. The defendant-tenant was arrested upon his arrival home. See Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961).

In the present case, an agent of the landlord, Denise Brucker, claims to have notified the tenant of record, Kenya Rowe, that access to her apartment was sought for inspection of a "lease

violation”. From the police reports, it also appears that Ms. Brucker contacted the Schenectady police to perform not only the entry, but also a search. *See Exhibit C, Report of Officer Leffingwell* (Sections relating K-9 unit arrival time, time notified and time entered apartment). This entry was supported by less facts than *Chapman* because there was no identifiable contemporaneous fact advanced by law enforcement authorities or the landlord learned prior to the entry which permitted the subsequent entry under the lease or without probable cause.

The lease signed by Ms. Rowe provides for exclusive occupation of Steinmetz Apartments with the other listed occupants. *Exhibit D, Dwelling Lease for Federal Programs signed by Ms. [REDACTED]*. Also in the lease are provisions which prescribe limited reasons for the landlord’s need to interrupt the exclusiveness of the occupation of the apartment. *Exhibit D, p. 4,*

¶ 18

1. The Authority’s representatives shall be permitted to enter a unit, during reasonable hours, for routine inspections, repairs or maintenance, making improvements, or to show the apartment for releasing.

Exhibit D, p.4, ¶ 18.

Aside from the reasons allowed for entry, the lease also specifically explains the procedure that would be followed to gain entry into the apartment.

1. ...,Written notice, specifying reasons for entry and delivered to the unit at least 2 days in advance, constitutes “reasonable notification”.
2. Premises may be entered without notice when there is reasonable cause to believe that an emergency exists.
3. In the event that no adult members of the household are present at the time of the entry, a written statement shall be left, specifying the date and time and purpose of entry.

Exhibit D, p.4, ¶ 18.

The landlord or its agent did not comply with these three provisions.

This is not a case where the landlord has retained physical rights to areas of the apartment but instead is a circumstance in which the landlord has relinquished entire control of the apartment to the tenant. *Exhibit D, Lease*. The cases of *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S.Ct. at 2801 (1990), *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) and *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) are controlling cases. In these cases which involved hotel and apartment searches authorized by clerks and landlords, the Court recognized the right to privacy to a tenant or guest when an owner relinquished control over the premises. *See Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S.Ct. at 2801 (1990), *see also Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), *accord Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). The Supreme Court also held that the occupant's Fourth Amendment right to privacy required a warrant and prevented the lessor from consenting or authorizing the search. *Chapman*, 365 U.S. 610.

This same right to privacy is not diminished by virtue of a person residing in publicly assisted housing. Any agreement which allowed for entry into the apartment of Ms. [REDACTED] was between her as the tenant and the Schenectady Municipal Housing Authority as the landlord.³ No provision allows for assignment of any rights under the lease. The police did not obtain any right of entry or consent to enter from an occupant or lessee of the premises. Legal authorities cannot

³ Paragraph 19 of the lease signed by Ms. [REDACTED] entitle "Notice Prodecures" apparently incorrectly references Paragraph 19 as providing additional notice procedures when those additional requirements are listed in Paragraph 18 as correctly referenced in the updated lease. *Exhibit E, Updated Unsigned Lease*.

use a landlord's right of entry to circumvent the Fourth Amendment warrant requirement or nullify a person's right to privacy. "[I]ndiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment," Payton v. New York, 445 U.S. 573, 583, 100 S.Ct. 1371, 1378, 63 L.Ed.2d 639.

The Fourth Amendment requires that the scope of every authorized search be particularly described. Once a landlord or in this case the landlord's agent believes criminal activity is occurring, a statement in support of a warrant and probable cause determination must be made by a magistrate before the agent can assist police with entry into a residence believed to be the place where the criminal activity is occurring.

Ms. [REDACTED] signed a lease for an apartment with the Schenectady Municipal Housing Authority. She lived in the apartment alone. At various times her brother, Jeremy would stay with her. He has a privacy interest in the apartment. As a result, Mr. [REDACTED] has standing to contest the entry and search. As a frequent overnight guest Mr. [REDACTED] had a reasonable expectation of privacy in his sister's apartment. *Minnesota v. Olson*, 495 U.S. 91, 99-100 (1990).

A. The Entry of the Apartment Without a Warrant Violated the Fourth Amendment

The Supreme Court has held that a search of a property by police officers authorized by a landlord who had not only apparent but actual authority to enter the house for some purposes is unconstitutional when that property is occupied by a tenant. *United States v. Chapman*, 365 U.S. 610 (1961). The purpose of the legal authorities for entering the property was not for an authorized reason under the lease, but to search for illegal activity. *Chapman*, 365 U.S. 610

(Reversing conviction because search was unlawful and evidence seized was inadmissible in federal prosecution).

On May 10, 2004 it appears a report was made to the “Tenant Investigation Office”. This report in its “narrative” listed “lots of noise”, “people in/out” and “[s]everal complaints about possible drug trafficking (sic.)” and listed the incident location as “SH”. *Exhibit F, Tenant Investigation Office Incident Report, dated May 10, 2004.* This report indicates that the housing authorities were concerned with possible illegal activities four days prior to entering and searching the apartment of Ms. Rowe. No affidavits or statements of witnesses in support of incident report have been provided to counsel. It appears that no attempt was made to obtain witness accounts or other corroboration of the complaints and submit them before a judge for a probable cause determination. Instead, the housing officials solicited the aid of the Schenectady Police Department and Sheriff’s agency along with a K-9 unit to address the report by entering the apartment four days later on May 14, 2004.

Later, in his report of the entry, Officer Leffingwell of the Schenectady Sheriff’s K-9 unit, indicated he was at the Steinmetz Homes at 8:15 a.m. on May 14, 2004. He was dispatched to the apartment at Steinmetz Homes at 8:28 a.m. The reason indicated for the use of the K-9 unit was a “drug search”. He arrived at 8:36 a.m. When he entered the apartment Mr. ██████ was asked to move to the kitchen. Mr. ██████ started to reach for something behind him with his hand and Officer Gallop called out “gun”. Officers Gallop and Leffingwell wrestled the handgun away and placed Mr. ██████ in handcuffs. *Exhibit C.*⁴

⁴ This version of the events of May 14, 2004 is factually inconsistent with the report of Officer Mark Kirker. Officer Kirker reported that upon entering the apartment Officer Art Zamparella saw Mr. ██████ laying on the couch with the handgun visible in his waistband.

B. No Exception to the Warrant Requirement Applies

1. *No Consent to Enter was Given by Ms. Rowe Nor Could it be Obtained from the Landlord*

If consent to search given by a third party is advanced as an exception to the warrant requirement it is incumbent upon the government to demonstrate by a preponderance of the evidence "that permission to search was obtained from a third party who possessed common authority over, or other sufficient relationship to, the premises or effects sought to be inspected." *United States v. Brown*, 328 F.3d 352, 356 (7th Cir. 2003)(quoting *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); see also *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir.2000). That burden cannot be met if agents faced with an ambiguous situation, and proceed without making further inquiry. Nor can the search be legitimized if the circumstances make it unclear whether the property to be searched is subject to mutual use *by the person giving consent* and the agents do not make further inquiry. *United States v. Whitfield*, 939 F.2d 1071, 175 (D.C. Cir 1991)(*emphasis added*).

The lease provisions cannot be construed as consent. First, the agreement was between a landlord and a tenant. Any allowances of entry by the tenant are limited to the landlord. Second, any entry would be governed and strictly construed according to the lease. Third, there was no common or apparent authority maintained by the landlord allowing for his or her ability to consent.

The entry on May 14, 2004 did not comply with the lease. These provisions are explicitly detailed in certain sections of the lease. The notice that was allegedly sent to her referenced

Exhibit A, Incident Report of Patrolman Mark Kirker dated May 14, 2004, Section No. 73.

provisions which do not correspond to the notice, entry or inspection provisions of her lease.

Exhibit G, "Two (2)Day Entry Notice" dated May 10, 2004.

The lease signed by Ms. [REDACTED] stated that representatives shall be permitted to enter a unit for, "routine inspections, repairs or maintenance, making improvements, or to show the apartment for releasing. Written notice, specifying reasons for entry and **delivered to the unit** at least 2 days in advance, constitutes "reasonable" notification." *Exhibit D*, p.4, ¶¶ 18 (emphasis added).

The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect? *Rodriguez*, 497 U.S. at 183- 189, 110 S.Ct., at 2798-2802; *Florida v. Roger*, 460 U.S. 491, 501-502, 103 S.Ct. 1319, 1326-1327, 75 L.Ed.2d 229 (1983) (opinion of WHITE, J.); *id.*, at 514, 103 S.Ct., at 1332 (BLACKMUN, J., dissenting).

Common authority requires "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Brown*, 328 F.3d 352, 356 (2d Cir. 1995)(*Quoting Mattock*, 415 U.S. at 171 n. 7, 94 S.Ct. 988). Neither the housing authority nor its agents had common authority of the apartment searched. At most they maintained exactly what was outlined on the lease, in certain limited instances a right of entry with proper notification to the tenant.

The ability or legal right to enter may qualify a person to be able to give consent to areas

of the property that are mutually used, but whether “mutual use” actually exists is based upon the facts known to the officers at the time of the search. *Wheatfield*, 939 F.2d 1071, 1074 (D.C. Cir. 1991). See *United States v. Warner*, 843 F.2d 401, 403 (9th Cir.1988) (permission for landlord to enter apartment for particular purpose did not give landlord authority to consent to search of apartment); see also *United States v. Fultz*, 146 F.3d 1102 (9th Cir.1998). The officers present upon the entry of 80 Steinmetz Homes knew that the apartment belonged to someone not present at that time and that the person giving them access was a representative of the landlord. Neither fact supports a conclusion of “mutual use”.

a. The Entry Cannot be Validated by *Rodriguez*

In addition, this type of entry and search was hypothetically presented by the Second Circuit in *United States v. Brown*, 961 F.2d 1039, 1041 (2d Cir. 1992) as an example of the type of entry that would not be excepted from the Fourth Amendment guarantees based upon the reasonable belief of the police officers. As *Brown* specifically limited, “*Rodriguez* would not validate,..., a search premised upon an erroneous view of the law. [] For example, an investigator’s erroneous belief that landladies are generally authorized to consent to a search of a tenant’s premises could not provide the authorization necessary for a warrantless search. *Id.* at 1041 (*citations in the original*).

Rodriguez only held that the Fourth Amendment does not invalidate warrantless searches based on a reasonable mistake of fact, as distinguished from a reasonable “mistake of law” and as a result the *Rodriguez* exception only applies to situations in which an officer would have had valid consent to search if the facts were as he reasonably believed them to be. See *United States v. Whitfield*, 939 F.2d 1071, 1074 (D.C. Cir.1991); *United States v. Welch*, 4 F.3d 761, 764 (9th

Cir.1993) ("[T]he doctrine is applicable only if the facts believed by the officers to be true would justify the search as a matter of law."). Neither the Supreme Court nor any court of appeals that has applied Rodriguez 's apparent authority doctrine has extended it to validate a warrantless search by officers who have made a reasonable error of law. *See United States v. Salinas-Cano*, 959 F.2d 861, 866 (10th Cir.1992) ("[The police officer's mistake] was a mistake of law rather than a mistake of fact, and Rodriguez therefore does not resolve the issue.") (internal citation omitted).

The officers acting in the present case, based upon the currently known facts could not have reasonably believed they had the authority to enter the apartment without a warrant. No permission had been given by the tenant, Ms. [REDACTED]. The landlord's representative did not and has not presented documentation of waiver of privacy interest or consent by the tenant conveyed to the officers. Nor do the police reports memorialize information given to the officers' in support of the warrantless entry.

Thus, the officers apparently believed that they had some authority based upon the landlord's limited ability to enter the apartment. Such a conclusion is a mistake of law. Limited right of access does not confer upon the landlord a common authority to consent. *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961)(An officer usually cannot assume that a landlord has authority to consent to search of property used by a tenant); *United States v. Warner*, 843 F.2d 401, 403 (9th Cir. 1988)("[A]t best, the landlord had permission to enter the property for the limited purpose of making specified repairs and occasionally mowing the lawn.")

2. Mr. [REDACTED] did not Consent

Any attempt to rely on “consent” given by Mr. ██████ is misguided and unsupported by controlling precedent. It is well established that a defendant's mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968); *United States v. Cooper*, 43 F.3d 140, 145 n. 2 (5th Cir.1995) (citing *United States v. Most*, 876 F.2d 191, 199 (D.C.Cir.1989)); *United States v. Gonzales*, 842 F.2d 748, 754 (5th Cir.1988), *overruled on other grounds* by *United States v. Hurtado*, 905 F.2d 74 (5th Cir.1990) (en banc). *See also United States v. Shaibu*, 920 F.2d 1423 (9th Cir.1990), *opinion amended by* 912 F.2d 1193 (9th Cir.1990)(Defendant had not impliedly consented to a search of his home by his failure to object when police followed him inside.).

Generally when determining whether consent is voluntary, the court looks to the totality of circumstances to assess whether the defendant has freely given consent. *United States v. Jenkins*, 46 F.3d 447, 451 (5th Cir.1995). Mr. ██████ was awoken unexpectedly by entry into the apartment. Any ability to freely consent was impaired by the entry underway. In addition, because of the amount of officers and their having seemingly already entered the apartment, any subsequent consent was overborn by the show of authority.

C. Administrative Search without Warrant Violates Fourth Amendment

The present search should not be defined as “administrative”. As is demonstrated by the officers’ reports, the entry and search was focused on determining whether criminal activity was occurring in the apartment. *See Exhibit C and F*. If this entry was made for the purpose of discovering a “lease violation” it would have been unnecessary to include the full array of law enforcement authorities in the execution of the entry. A simple visit to the apartment with

appropriate notice would have sufficed.

Even if this court were to construe this search as administrative, the housing authority still failed to fulfill the requirements for conducting such a search. *See Camara v. Municipal Court*, 387 U.S. 523, 534, 539-40, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)(Holding that the Fourth Amendment requirement of a search warrant, consent, or exigent circumstances applied, although finding of probable cause was diluted).

Camara involved a tenant who refused to consent to an inspection of his property and then sued to enjoin prosecution for violation of a housing code. *Camara*, 387 U.S. at 525-28, 87 S.Ct. at 1729-30. The inspectors were acting pursuant to a San Francisco ordinance which allowed them to enter a building without a warrant and check for possible building code violations. *Id.* at 525-27, 87 S.Ct. at 1729. The Supreme Court held that warrantless searches of residential property by municipal inspectors violated the Fourth Amendment protection against unreasonable searches and seizures. *Id.* at 528-34, 87 S.Ct. at 1731-33. The Court reasoned that administrative searches for housing code violations significantly intrude upon the interests protected by the Fourth Amendment and, therefore, administrative searches which are not authorized by a warrant violate the traditional safeguards provided by the Fourth Amendment and are unconstitutional. *Id.* at 532-34, 87 S.Ct. at 1733.

The Court did acknowledge the strong governmental interest in inspecting for housing code violations and established the standard for obtaining administrative search warrants to inspect for such violations. *Id.* at 538- 40, 87 S.Ct. at 1736. The Court concluded that " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* Some

factors to be considered include "the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area...." Id. However, the Court went on to conclude that reasonableness is the ultimate standard. Id. As long as "a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." Id. However, no warrant was ever sought nor consequently issued in this case.

WHEREFORE, the evidence seized during the search of the apartment at 80 Steinmetz Homes is subject to suppression.

Conclusion

WHEREFORE, the defendant, Jeremy [REDACTED] respectfully requests suppression of the firearm discovered as part of an illegal entry into a residence in which he had a right to privacy. In addition, Mr. [REDACTED] also requests the statements made subsequent to the discovery of the firearm also be suppressed as fruits of the illegal entry and arrest.

DATED: January 7, 2005

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Certificate of Delivery

I certify that I have delivered a copy of the foregoing pleading to Assistant United States Attorney, Carlos Moreno, at 445 Broadway, Room 218, Albany, New York by electronic filing

/s/ Gene Primomo
Gene V. Primomo
Assistant Federal Defender