

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,

Plaintiff,

VS.

\$11,600.00 IN UNITED STATES CURRENCY;

Defendant,

**NOLAN MILLER and
CARLISS MOORE,**

Claimants.

8:08CV294

MEMORANDUM AND ORDER

This matter is before the magistrate judge by consent of the parties on the Claimants' Motion to Suppress Evidence (Doc. 19). An evidentiary hearing was held on April 8, 2009 (see Doc. 29) and May 12, 2009 (see Doc. 35).

The defendant currency was seized pursuant to a search warrant obtained after three members of the Metro Area Fugitive Task Force performed a warrantless search of the claimants' residence. Claimants contend that all evidence obtained from the warrantless search should be suppressed and excluded from use at trial because the search occurred without a warrant or consent, in violation of the Claimants' rights under the Fourth Amendment to the United States Constitution. The government argues that claimant, Nolan Miller, consented to the initial warrantless search.

For the reasons discussed below, I find that the motion should be granted.

I. EVIDENCE

The Metro Area Fugitive Task Force locates and apprehends individuals who have state and federal felony warrants. On February 15, 2008, Omaha Police Officer Tony Friend, Deputy U.S.

Marshal Will Iverson, and Deputy U.S. Marshal Jaime Galindo were assigned, as part of a Task Force team, to execute an arrest warrant issued for one Katara Smith. Officer Friend was the lead investigator for this warrant.

The arrest warrant itself indicated that Katara Smith could be located at his mother's residence near Fontenelle and Sorenson. Officer Friend had records information that Smith was a passenger in a vehicle stopped "some months ago," perhaps in July 2007. The vehicle belonged to Carliss Moore and was registered to the address 2519 Decatur. Based on this information, Friend first directed the entire team to the Decatur Street address to search for Katara Smith.

Claimant, Nolan Miller, resides at 2519 Decatur Street. Carliss Moore is Miller's fiancée. The house at 2519 Decatur has three floors (including a 576-square-foot basement) and three bedrooms.

Officer Friend testified he could not recall how many officers were assigned to his team on February 15, 2008; on any given day, a Task Force team may have anywhere from four to 15 members. According to Officer Friend, his team split up to look for Katara Smith shortly after the initial entry into Nolan Miller's residence. Miller, Iverson and Galindo were wearing black "raid" vests with weapons visibly holstered at their sides.

The task force arrived at the Decatur Street residence at about 7:00 or 7:30 a.m. Officer Friend testified that he, Galindo, and Iverson approached on foot directly to the front door on the front porch. He had to knock several times before somebody came to the front door. He could hear small children inside the house. Nolan Miller came to the door wearing nothing but a towel; he appeared to be wet, as if he had just gotten out of the shower. Friend testified he said something to the effect of, "Omaha Police Department. I'd like to talk to you about an incident. Can we step in and talk to you?" At some point, Friend explained to Miller that the officers were looking

for Katara Smith and wanted to talk to Miller about Smith. Friend could not say for certain whether this explanation occurred before or after the officers entered the front door.

According to Officer Friend, Miller invited the three officers into the house. They were all standing inside the front entryway when Miller explained that Smith was a friend of his, but he hadn't seen Smith for a while. Officer Friend then asked Miller for permission to search the residence for Katara Smith.

Friend testified that Miller seemed "a bit apprehensive" at first and said he was not comfortable with them searching the house. Friend explained to Miller that the Task Force did not go into drawers and were not looking for evidence; they were strictly looking for bodies. According to Friend, Miller was comfortable with that explanation and said, "Go ahead." Friend testified on cross-examination that he asked Miller for permission to search a total of two times and was in the residence a minute or two before Miller told them to go ahead and search.

Officer Friend testified that he continued to talk to Miller at the front doorway while the two deputy marshals searched the house. Friend asked Miller to call him if he knew where Katara Smith was. Miller responded that he would not because Smith was a friend.

Friend recalled that Galindo and Iverson searched the house together; they did not split up. They started on the main floor, then went upstairs, and then back down on the main floor. They then searched the basement for Mr. Smith. The entire search took about five minutes.

Towards the end of the search, Iverson opened a closet door in the hallway and Friend smelled a strong odor of marijuana. Iverson announced, "It's in plain view right here," pulled a gallon-size see-through Ziploc baggie of marijuana down from the top shelf of the closet, and told Deputy Galindo to handcuff Nolan Miller. Friend walked over to the closet and told Iverson to put the marijuana back up on the shelf where he found it. Iverson did so, and then pulled some clothes back to make sure nobody was in the closet. Iverson felt a garbage bag on the bottom of the closet

as he was moving it and told Friend that it "felt like marijuana." Friend looked at the bag and thought it did contain marijuana. The garbage bag did, in fact, contain 11 pounds of marijuana packaged in gallon-size see-through Ziploc baggies.

At that time, the officers "secured" Miller on a couch and summoned Friend's sergeant and the Narcotics Unit to come to the house and assess the situation.

Deputy Iverson testified that he initially stood off to the side of the porch, next to the garage door, when Officer Friend knocked on the door. He believed Friend opened the storm door in order to knock on the inside door. Eventually, Nolan Miller came to the door. Iverson saw Friend speaking with Miller but could not hear their conversation.

Iverson initially recalled that he entered the residence after Friend announced that Miller was going to let them in to look for Smith. Friend first entered the house with Miller. Iverson and Galindo came to the front door and Friend told them something to the effect of, "He's going to let us search. Go ahead." They then followed Friend inside the house. The door was open when he got there. He testified on redirect, however, that they had just entered the entryway when Friend said that Miller had given consent.

The search began within five seconds of their entering the house. He and Galindo began by searching the upstairs but found nothing of significance. They came downstairs, walked through the kitchen, and then came back towards the front door. Iverson opened a closet located on the main floor, between the kitchen and the entryway. As soon as he opened the closet, he smelled the odor of raw marijuana. He looked up and saw what appeared to be a bag of marijuana in plain view up on the top shelf of the closet. The bag was wedged in among hats and other personal items. Iverson finished searching the closet by moving aside some clothes. At that point, he put his hand on a lawn and leaf bag on the closet floor and could kind of tell that it probably contained more of the baggies that he saw at the top of the closet.

Iverson testified on redirect that he and Galindo searched the house together. He denied searching the basement, but thought somebody else did search the basement.

According to Iverson, the search ended after the marijuana was found. Miller, who had remained standing with Officer Friend near the front door, was then secured and they called for Friend's supervisor to come to the scene. Iverson announced that the house was clear.

Investigator Galindo testified that he stood on the front porch, to the right of the front door, looking at the windows, as Officer Friend knocked on the door at 2519 Decatur. Deputy Iverson was standing on the left side of the porch near the stairs. When Miller answered the door, Officer Friend advised that they were from the Fugitive Unit and were looking for Katara Smith. Miller invited the officers to come inside because he was in a towel and it looked like he just got out of the shower. They had not been given permission to search before they entered the residence.

Galindo, Iverson and Friend all went inside at which time Miller stated that Smith was his friend, he knew Smith for a while and had not seen him. Friend explained to Miller that Smith was stopped in a vehicle that belonged to Carliss Moore, some months ago, and he just was doing some follow up on it. Galindo testified that he and Iverson remained standing in the entry way near the front door. He did not recall asking Miller for identification and did not remember Miller going anywhere to get his identification.

According to Galindo, Miller hesitated when Friend asked him for permission to search the house. Officer Friend then explained that they don't go in drawers; they look in areas where people can hide. Miller then said, "Okay, you guys can search the house."

Galindo testified he did not recall whether the house had a basement, and did not recall searching the basement or the garage. He and Iverson searched the house together, beginning with the upstairs, proceeding downstairs through the kitchen and then coming down a hallway that can be seen from the front door. Iverson opened the closet door in the hallway, and Galindo could

smell the odor of raw marijuana. Galindo was standing to the side of the closet door when Iverson found the baggie of marijuana. The search ended at that time. Iverson told Galindo to secure Nolan Miller. Galindo placed Miller in handcuffs and stayed with him. Galindo did not recall what Miller was wearing when he was handcuffed. He did not know where Friend and Miller were during the search—whether they had moved a little bit into the living room or further out in the hallway.

Within 10 minutes of finding the marijuana, Galindo was dispatched to another location to assist with Katara Smith, who had been arrested at his mother's residence, which was the address given on the search warrant.

Nolan Miller testified that he was in the shower between 7:00 and 7:30 AM on the date in question when he thought he heard his two children beating on the bathroom door. Eventually, Miller's daughter came into the bathroom and said somebody was beating at the door. Nolan told her to look out the window and see who it was. She reported that it was the police. Miller then jumped out of the shower, put a towel on, looked out the window, and saw the officers standing there.

Miller, who was wearing only a towel, opened the door. Officer Friend was holding the storm door open. Miller asked Friend what was going on and how could he be of help. Friend, who was carrying a file, responded that he was conducting an investigation of Katara Smith. Friend opened the file and Miller immediately saw a picture of his fiancée in the file. Friend told Miller there was an arrest warrant for Katara Smith, they were looking for Smith, and they wanted to search Miller's residence to look for Smith.

Nolan Miller testified that he told Officer Friend he had not seen Katara Smith for over seven months and refused to let the officers search his house. Friend responded that they needed to search the house just to make sure Smith wasn't there. Miller told him once again, "No, you can't

search my house," but offered to let Friend talk to the kids. According to Miller, none of the officers had yet entered the front door when this conversation occurred.

Officer Friend did not want to involve the kids, so the two children went back upstairs to their rooms. Friend then told Miller they needed to go ahead and search the residence. Miller told him no again, at which time Friend asked him for identification. Miller testified that he left the front door to go grab his ID. When he looked back, he saw that all three of the officers had stepped inside the front door. Officer Friend told Miller they were just going to stand right there at the front door while he got his identification because it was cold outside. Miller denied inviting the officers into the house.

Miller testified he first thought his identification was on the dining room table, but it was not there. Nor was it on the couch in the pocket of the pants he was wearing the night before. According to Miller, all three officers advanced to the carpeted area and stood around him near the couch while he was searching through his pants pockets.

When Friend asked whether Miller could find his ID, Miller said he could not, but thought it was outside in his rental car, a white Pontiac Grand Am parked in the driveway. Friend said that Miller needed to get the identification and he should just go ahead and consent to the search because they were going to search, "regardless," to look for Katara Smith; they were not looking for anything but Katara Smith. Miller again denied permission to search.

Since Miller needed to get his ID out of the car, he went back to the couch, grabbed his pants, and put them on over his towel. He put on a jacket and went outside with Officer Friend. As they left the house, Miller heard one of the other officers state that they were going to go ahead and search for bodies.

Officer Friend followed Miller out the front door to the driveway. Miller got in the driver's door of the vehicle, found his ID, and gave it to Officer Friend. As they returned to the house,

Friend asked if Miller would give him a call if he saw Katara Smith. Miller said he would not, "because I don't do that. I'm not like that."

Officer Friend followed Miller back into the house. Miller noticed that Deputy Iverson had just closed the closet door. Iverson and Galindo proceeded to the kitchen out to the garage to search in the garage. A couple seconds later, Iverson announced that the house was all clear. The officers came back down the hallway as if they were about to leave the residence. Miller testified that he heard Iverson say to Officer Galindo, "Do you smell that?" Iverson then reopened the closet door, looked up and down, and grabbed a baggie. He held the baggie up in the air saying, "This was in plain view. What's this, Mr. Miller? What's going on here?"

Miller testified that he told Iverson that they did not have the right to search his residence anyway. Iverson told Miller to calm down and told Officer Friend to put Miller in handcuffs. Friend placed Miller, who was wearing only a pair of jeans, in handcuffs. The officers did not continue on to the basement to search for Katara Smith. A few seconds after Miller was handcuffed, he heard over one of the police radios that they had Katara Smith in custody. He remained at the residence for about two and a half hours with Officer Friend and Deputy Iverson.

Miller testified he knew there was 12 pounds of marijuana in the closet at the time the officers were trying to get him to consent to search. He acknowledged he had "quite a few" contacts for possession of marijuana in his cars. Some times, he told the police they could not search, but they did it anyway and let Miller throw the weed out and stomp on it. Other times, he told them no and they just walked away from the vehicle. Prior to February 2008, Miller had about 10 to 15 incidents where police officers had requested to search his vehicle or person.

II. LEGAL ANALYSIS

A. Burden of Proof

In this civil forfeiture action, the evidence relied upon by the government is subject to the exclusionary rule, a mechanism designed to enforce the Fourth Amendment's guarantee to be free from unreasonable searches and seizures. *See, e.g., United States v. \$55,000.00 in U.S. Currency*, 2007 WL 2084145 at *2, Case No. 06-2447 (D. Minn., July 17, 2007) (citing *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 646 (8th Cir. 1999), *cert. denied*, 528 U.S. 1161 (2000)).

A warrantless search of a house is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). Absent exigency or consent, warrantless entry into the home is impermissible under the Fourth Amendment. *Steagald v. United States*, 451 U.S. 204, 211-212 (1981). The issue presented in this case is whether Nolan Miller voluntarily gave the Metro Area Fugitive Task Force officers permission to enter and search his residence. The government must prove, by a preponderance of the evidence, that Miller voluntarily consented to the search. *United States v. Comstock*, 531 F.3d 667, 676 (8th Cir.), *cert. denied*, 129 S. Ct. 590 (2008) (burden of proof); *see also United States v. Fleck*, 413 F.3d 883, 891-92 (8th Cir. 2005).

Within the Eighth Circuit, civil juries are routinely instructed to consider several factors in evaluating the credibility of witnesses:

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

Eighth Circuit Model Jury Instruction No. 3.03 (2007).

In this instance, all three officers described Miller as being "apprehensive" or even "hesitant" when Friend first asked for permission to search the house. There is testimony that Iverson and Galindo did not enter the house until Friend told them Miller was going to let them look for Katara Smith. There is testimony that Miller gave consent while all three officers were standing inside the front doorway. Iverson did not actually hear Miller consent. Galindo may have heard Miller consent, but his testimony was not clear on that point. While Officer Friend testified that the basement was searched, Iverson and Galindo both denied searching the basement, and they were the only other officers in the house at the time. The three officers could not accurately recall many details of this incident, e.g., whether they asked Miller for identification or whether he was wearing clothes when he was handcuffed.

Nolan Miller was adamant that he did not give the officers consent to search his house. Miller's uncontroverted testimony was that he had been contacted by the police many times for possession of marijuana. On at least 10 previous occasions, police officers had asked to search his vehicle or person. He knew he did not have to give consent, and he knew there was 12 pounds of marijuana in the closet when the officers were trying to get him to consent to search.

The parties' briefs indicate that Miller's residence was searched a second time, pursuant to a search warrant, which may account for the ambiguous testimony about whether or when the basement and garage were searched and whether Miller was asked for ID. The court generally attributes the officers' conflicting testimony to misrecollection or lapse of memory due to the passage of time, and not to any intentional misrepresentation of the facts.

The government must prove, by a preponderance of the evidence, that Miller voluntarily consented to the search. Considering the various witnesses' testimony, the court is left only with a sense of ambiguity as to what actually happened at Nolan Miller's residence on the morning of February 15, 2008. The court finds that the government has not shown by a preponderance of the evidence that Nolan Miller voluntarily consented to the search of his residence.

III. ORDER

IT THEREFORE IS ORDERED that the Claimants' Motion to Suppress Evidence (Doc. 19) is granted.

DATED July 29, 2009.

BY THE COURT:

**s/ F.A. Gossett
United States Magistrate Judge**