UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

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UNITED STATES OF AMERICA	CRIMINAL ACTION 1:17-CR-00204
VERSUS	JUDGE DRELL
NATHAN BURL CAIN II, *et al.*	MAGISTRATE JUDGE PEREZ-MONTES

REPORT AND RECOMMENDATION

Defendants filed a motion to suppress evidence seized by an investigator for the Inspector General pursuant to a search warrant. A hearing was held on the motion. Because Defendants' do not have standing to contest the validity of the search, their Motion to Suppress should be denied (Doc. 34).

I. Background

Defendants Nathan Burl Cain II ("Cain") and Tonia Bandy Cain ("Tonia"), were indicted on six counts of wire fraud (Doc. 1). Defendants filed this Motion to Suppress (Doc. 34), seeking to suppress use of evidence illegally seized by state officials pursuant to the "Silver Platter Doctrine." See Elkins v. United States, 364 U.S. 206 (1960).

Cain was Warden of the Avoyelles Correctional Center ("ACC") in Cottonport, Louisiana from 2012 to May 2016. Tonia was an employee of ACC through May 2016.

In June 2016, Nicole Compton, a criminal investigator with the Louisiana Office of the State Inspector General (the "IG's Office"), obtained a search warrant for the Cains' residence. The evidence seized was eventually turned over to the

United States Attorney's Office for the Western District of Louisiana, which in turn used it to indict Defendants for wire fraud.

II. Law and Analysis

Defendants argue all evidence obtained pursuant to the warrant must be suppressed because the IG's Office does not have the authority to obtain and execute search warrants. However, the Court must first determine whether Defendants have "standing" to object to the search of their former home on the grounds of the Avoyelles Correctional Center. The parties were ordered to file supplemental briefs on that issue (Doc. 49).

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers. See Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (citing Elkins v. United States, 364 U.S. 206, 213 (1960)).

Whether a defendant has standing to contest the validity of a search "depends on (1) whether the defendant is able to establish an actual, subjective expectation of privacy with respect to the place being searched or items being seized, and (2) whether that expectation of privacy is one which society would recognize as reasonable." United States v. Gomez, 276 F.3d 694, 697 (5th Cir. 2001) (citing United States v. Kye Soo Lee, 898 F.2d 1034, 1037-38 (5th Cir. 1990)). The defendant bears the burden of proving not only that the search was illegal, but also that he had a

legitimate expectation of privacy in the place searched. See Rawlings v. Kentucky, 448 U.S. at 104.

The difficult question is whether Defendants' expectation of privacy in a place "is one which society would recognize as reasonable." See Gomez, 276 F.3d at 697–98 (citing Kye Soo Lee, 898 F.2d at 1037-38). Fourth Amendment rights are individually held and cannot be asserted solely by reference to a particular place. The factors to be weighed include: (1) whether the defendant has a possessory interest in the thing seized or the place searched; (2) whether he has the right to exclude others from that place; (3) whether he has exhibited a subjective expectation that it would remain free from governmental invasion; (4) whether he took normal precautions to maintain his privacy; and (5) whether he was legitimately on the premises. See Gomez, 276 F.3d at 697–98 (citing United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir. Unit A Jul. 1981)). No one circumstance has a decisive "talismanic" significance. See id.

There is no standing to contest a search and seizure if a defendant: (a) was not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) is not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. See United States v. Hunt, 505 F. 2d 931, 939 (5th Cir. 1974), cert. den., 421 U.S. 975 (1975) (citing Brown v. United States, 411 U.S. 223, 229 (1973)); see also U.S. v. Kelley, 140 F.3d 596, 602 n. 3 (5th Cir. 1998), cert. den., 525 U.S. 880 (1998); U.S. v. Williams, 613 F.2d 560, 563

(5th Cir. 1980); U.S. v. Evans, 572 F. 2d 455, 586 (5th Cir. 1978), cert. den. *sub nom.,* 439 U.S. 870 (1978); U.S. v. Foster, 506 F.2d 444, 445 (5th Cir. 1975), cert. den., 421 U.S. 950 (1975). Generally, a defendant satisfies the standing requirement if he has an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy. See Hunt, 505 F. 2d at 938 (citing U.S. v. Banks, 465 F. 2d 1235, 1239-40 (5th Cir. 1972), cert. den., 409 U.S. 1062 (1972)); see also U.S. v. Torres, 346 Fed. Appx. 983, 988 (5th Cir. 2009), cert. den., 559 U.S. 1022 (2010).

Louisiana Department of Corrections ("DOC") Regulation No. A-06-001, allows "ranking administrative and security staff, maintenance staff, medical/mental health staff, tactical and chase teams and an adequate number of CSO's (Corrections Security Officer) to maintain a ready reserve force" to live in houses provided on the grounds of some prison facilities. The policy authorizes the warden to assign available housing, rent-free, in a manner that promotes safe, stable, and effective operations.[1]

Defendants admit Nathan Cain retired on May 24, 2016 and Tonia Cain retired on May 21, 2016 (Doc. 34-1, p. 1/10). Defendants further admit the search took place on June 8, 2016 (Doc. 34/1, p. 2/10). Nothing in the record indicates the Cains were present during the search, nor are they charged with an offense that includes as an

[1] From an investigative audit issued by the Louisiana Legislative Auditor on January 18, 2017 for the Louisiana State Penitentiary at Angola, State of Louisiana Department of Public Safety and Corrections.

element possession of the seized evidence at the time of the search. Therefore, Defendant must show a proprietary or possessory interest in the residence.

The United States contends in its first brief that Defendants had left their employment at ACC and vacated the warden's residence before the search took place (Doc. 38, p. 2/9). In the OIG investigator's search warrant application, the investigator stated the Defendants were no longer employed at ACC, and had "partially vacated the residence" (some things had been left in the house) owned by the State (Doc. 34-2, p. 2/5). Defendants have not argued or shown they still had possession of the house at the time the IG's Office searched it.

The State of Louisiana owns the Cains' former residence. The residence is located on state property. According to the United States's supplemental brief (Doc. 51) and a June 3, 2016 letter to the Cains from the DOC (Doc. 51-1),[2] once Warden Cain resigned, Defendants no longer had the right to live in the Warden's house, so their possessory right was lost. Defendants apparently left some movables in the house for two weeks, despite notice from the DOC to remove their personal belongings (Doc. 50-1). Those items were apparently abandoned. In letters dated July 1, 2016 and August 10, 2016, the Cains were notified by the DOC that their belongings still remaining at ACC had been deemed abandoned and would be disposed of (Docs. 50-

[2] The June 3, 2016 letter from the DOC to the Cains (Doc. 51-1) referenced a previous letter notifying Nathan Cain that he had to remove his personal belongings from the residence, as well as other correspondence to arrange for the Cains to remove their personal property from the warden's house at ACC.

At some point, the IG's Office became aware that some of the personal belongings left at the ACC Warden's house had been improperly purchased with state funds. On June 2, 2016, the IG's Office imposed a prohibition against removal of any property from the house without authorization from the Inspector General, in order to preserve any evidence (Doc. 51-1).

1, 50-3). Defendants have not argued or shown they had the right to possess the house for any length of time after they retired. A letter dated June 3, 2016, from the DOC to the Cains, indicates the Cains were expected to have vacated by the time Nathan Cain resigned as warden, or they should have made some alternative arrangement with ACC for leaving some of their belongings (Doc. 51-1). The Cains did neither.

Without a possessory interest in the house, Defendants could neither exclude others from the house nor take precautions to maintain the privacy of the property. See United States v. Setser, 568 F.3d 482, 491 (5th Cir.2009), cert. den., 558 U.S. 963 (2009). Therefore, Defendants no longer had a reasonable expectation of privacy in the house.

Because Defendants no longer had a reasonable expectation of privacy in the ACC Warden's house at the time of the disputed search, they do not have standing to contest the search.[3] Therefore, Defendants' motion to suppress should be denied.

III. Conclusion

Based on the foregoing, IT IS RECOMMENDED that Defendants' Motion to Suppress (Doc. 34) be DENIED.

Under the provisions of 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b), parties aggrieved by this Report and Recommendation have fourteen (14) calendar days from service of this Report and Recommendation to file specific, written

[3] Since Defendants do not have standing to contest the search of their former residence, their argument as to the Inspector General's authority to execute a search warrant is not considered.

objections with the Clerk of Court. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. No other briefs (such as supplemental objections, reply briefs, etc.) may be filed. Providing a courtesy copy of the objection to the undersigned is neither required nor encouraged. Timely objections will be considered by the District Judge before a final ruling.

Failure to file written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation within fourteen (14) days from the date of its service, or within the time frame authorized by Fed. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Judge, except upon grounds of plain error.

THUS ORDERED AND SIGNED in Chambers at Alexandria, Louisiana on this 16th day of May, 2018.

Joseph H.L. Perez-Montes
United States Magistrate Judge