

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA

v.

**MARCO LARA-GONZALEZ and
IGNACIO LARA-GONZALEZ,**

Defendant.

CRIMINAL INDICTMENT

NO. 1:09-CR-510-JEC

FINAL REPORT AND RECOMMENDATION

Defendants Marco Lara-Gonzalez and Ignacio Lara-Gonzalez (together, “Defendants”)¹ are charged with conspiracy to distribute and possession with intent to distribute marijuana in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(D). Defendant Marco is charged in two separate counts with possession with intent to distribute cocaine and possession of two firearms by an illegal alien. Defendant Ignacio is also charged in a separate count with possession of a firearm by an illegal alien.

Pending before this court are Defendant Marco’s Motions to Suppress Evidence and Statements [Docs. 32 and 33] and Defendant Ignacio’s Motions to Suppress Statements and Search and Seizure [Docs. 30 and 31]. An evidentiary hearing on these

¹When referring to either one of the Defendants separately, I will refer to them by their first name only (“Defendant Marco” or “Defendant Ignacio”).

motions was held before me on January 13, 2010. Agents Krueger, Bowen and Martinez testified for the government, and Defendant Ignacio testified for the defense. All transcript references are to the transcript of that hearing. My recommendations follow.

I. FACTS

Throughout 2008 and 2009, the Drug Enforcement Administration (“DEA”) was conducting an investigation into a drug trafficking organization known as La Familia. (T. 5). Wiretaps and surveillance from that investigation led the DEA to conclude that 4199 Northwinds Drive, Ellenwood, Georgia was a drug stash house or associated with drug stash houses of La Familia. (T. 6, 7, 18, 29). DEA agents frequently observed a Gold Nissan Pathfinder at that address. (T. 7-8, 18).

The DEA’s investigation of La Familia resulted in the seizure of 360 pounds of marijuana on October 19, 2009. (T. 5, 14, 54). After the seizure, agents overheard a conversation on a wiretap between two members of the organization. In the conversation, an unknown individual in Mexico advised an individual in the United States to hide or bury drug proceeds. (T. 30). The DEA therefore set up surveillance that day at all of the suspected drug stash houses related to the investigation, including the house on Northwinds. The agent conducting surveillance on the Northwinds house had orders to stop and talk to anyone leaving the house. (T. 31).

Defendant Ignacio, Defendant Marco, and a friend named Jose Patino (“Patino”) were at the Northwinds house on October 19, 2009. (T. 36, 100-101). Defendant Ignacio was twenty years old at the time. He is an illegal immigrant, and, as of October 2009, he had been in the United States for less than a year. The last year Defendant Ignacio completed in school was the third grade; he does not speak or read English; and he speaks Spanish but is unable to write it. Prior to October 19, 2009, he had no experience with American law enforcement officers. (T. 99, 117).

A DEA supervisor directed several additional agents to go to the Northwinds house to assist with the surveillance. (T. 31). Among the agents who proceeded to the house were Task Force Officer (“TFO”) Larry Krueger, TFO Pat Skinner, and Special Agent Lourdes Bowen. (T. 8, 31).

Before the additional agents arrived at the Northwinds house, the officer performing surveillance on the house saw Defendant Marco leave the house in the Gold Nissan Pathfinder. As TFO Krueger arrived, he observed the vehicle leaving the Northwinds subdivision. (T. 8). He and TFO Skinner blocked the path of the Pathfinder about a block away from the house. (T. 8-9, 32).² TFOs Krueger and

²Agents also stopped another vehicle, but determined after the stop that it was not related to their investigation. (T. 33).

Skinner recognized Defendant Marco from previous surveillance of the Northwinds address. (T. 33-34).

As TFO Krueger approached the car, Defendant Marco dropped his hands out of sight. Defendant Marco then stepped outside of the vehicle. (T. 9). After Defendant Marco exited the vehicle, TFO Krueger asked to see his driver's license. At that point TFO Krueger observed on the car's floorboard a plastic bag containing a small amount of marijuana. (T. 10). He then handcuffed Defendant Marco. (T. 11, 17).

At approximately the same time -- about 9:00 p.m.-- Special Agent Bowen, who speaks Spanish, arrived at the Northwinds house along with another agent and knocked on the door. The agents could see that a light was on inside the house. They knew that someone was in the house. They agents knocked on the door for about five minutes, but the occupants did not come to the door. The agents' goal was to obtain consent to search. (T. 31-2, 50, 53, 55, 60).

Defendant Ignacio and Patino were inside the house and heard the knocking. Patino asked Defendant Ignacio who was at the door, and Defendant Ignacio responded that it was a woman. Patino stated, "oh, just leave it like that, who knows who she may be." (T. 101). They did not answer the door. (T. 60).

Meanwhile, at the scene of the traffic stop, TFO Krueger realized that Defendant Marco spoke very little English and called Special Agent Bowen for help

communicating with him in Spanish. (T. 10, 32-33). Special Agent Bowen left the residence and went to the traffic stop location. She arrived within five minutes of the traffic stop. (T. 11). Two other agents continued watching the house to ensure that no one else left the house. (T. 33).

When Special Agent Bowen arrived at the traffic stop location, Defendant Marco was standing next to the Pathfinder. Special Agent Bowen did not recall if Defendant Marco was handcuffed. (T. 33). Special Agent Bowen asked Defendant Marco about his relationship to the Northwinds house, whether his keys fit the Northwinds house, and whether he would accompany the agents back to the house. (T. 34-35). Special Agent Bowen hoped that Defendant Marco would take her back to the house and let her in or try to get the occupants of the house to answer the door. However, Defendant Marco told her that he had been visiting friends at the Northwinds house, that his keys did not fit the house, and that he did not want to accompany the agents back to the house. (T. 35). The agents then placed Defendant Marco under formal arrest and returned to the Northwinds house. (T. 35-36).

Once back at the Northwinds house, Special Agent Bowen and several other agents parked their vehicles in front of the house, approached the house and knocked on the door again. (T. 36, 58, 60). Law enforcement officers parked approximately six vehicles, including two Georgia State Patrol vehicles, in front of the house. (T. 58).

Again, agents approached and knocked for “a couple of minutes.” The occupants still did not answer the door. (T. 36).

The agents then went across the street. (T. 36, 61). Special Agent Bowen called her supervisor to apprise him of the situation. Her supervisor advised her to call the United States Attorney’s office to start the process for obtaining a search warrant. At that point, a light on the front porch of the house came on and Special Agent Bowen told her supervisor that they would approach the house again. The agents did not attempt to obtain a search warrant. (T. 6).

Special Agent Bowen and three others agents³ returned to the front door of the house a third time and again knocked on the door. Special Agent Bowen could not recall how long the agents knocked on this occasion. (T. 25, 36, 61-2). At least two of the agents at the door were wearing “raid vests” and had guns visible. Special Agent Bowen displayed her badge. All of the agents were armed. Special Agent Barnes had an assault rifle/submachine gun on a sling at his side where he had easy

³TFO Krueger did not “recall specifically” how many officers approached the front door. He does remember that he, Special Agent Bowen, and Special Agent Barnes approached the door. (T. 26). Special Agent Bowen testified that she went to the door with Special Agents Barnes and Lindsey, “and if anybody else came up after that, I don’t know.” (T. 61, 66). Reconciling their testimony, I find that four agents were at the front door: Bowen, Barnes, Lindsey and Krueger.

access to it. (T. 37, 70). Special Agent Lindsey may have had his handgun in his hand. (T. 71).

Inside the house, Defendant Ignacio and Patino looked outside and saw many cars on the street near the house.⁴ They also saw Special Agent Bowen at the door and observed that she had a firearm. (T. 101-102). Defendant Ignacio and Patino then opened the door. (T. 36).

Special Agent Bowen told Defendant Ignacio and Patino that she was a law enforcement agent and asked them if anyone else was in the house. The two men responded that they were the only people in the house. Special Agent Bowen said that she wanted to talk to them. She then asked them if they would let the agents in the house for a security sweep for officer safety to ensure that nobody else was in the house. (T. 37, 62-3). Defendant Ignacio asked Special Agent Bowen what was going on and who they were looking for. (T. 102-3, 105).

Eventually, Defendant Ignacio and Patino said that the agents could come in and make sure no one else was in the house. (T. 37). After receiving consent, Special Agent Bowen told Special Agent Barnes that both men had given consent to a

⁴Defendant Ignacio thought there were about ten cars outside his house. (T. 101).

protective sweep. Special Agent Barnes then told other agents that they had consent for a protective sweep.⁵ (T. 66).

Simultaneously with Special Agent Bowen's questioning at the door, some of the agents at the door entered the house and ran upstairs. (T. 103-106). Defendant Ignacio told Special Agent Bowen that it was "okay" after some of the agents had already entered the house and gone upstairs to conduct the security sweep. (T. 106, 108, 117).

Defendant Ignacio said okay because the agents were already in the house. The agents entered the house within approximately ten seconds after the door was opened. (T. 104-105, 107). Defendant Ignacio was "scared because [he] did not know . . . what was going on." (T. 103-104). He was unaware of his right to refuse consent. (T. 116-117).

⁵As discussed below, I find that the occupants of the house gave consent only after some of the agents had already entered the house. In making this factual finding, I have reconciled all of the testimony and do not find that any of the witnesses lied. While somewhat unclear, I interpret TFO Kreuger's testimony (T. 27) to be that he entered the house during the conversation Special Agent Bowen was having with Defendant Ignacio. This testimony is consistent with Ignacio's repeated testimony that officers entered the house within seconds of his opening the door, while he was still speaking with Special Agent Bowen and before he gave permission for them to enter. (T. 102-6, 108). Also, while Special Agent Bowen denied that *she* entered the house before receiving permission to enter, she did not squarely deny that TFO Kreuger entered the house before she (Agent Bowen) had obtained permission to enter. (T. 62-3).

Special Agent Bowen did not know how many agents entered and performed the protective sweep, nor did she know how long the protective sweep lasted. (T. 74, 78). At least three armed officers conducted the sweep. (T. 79). The government concedes that there were between six and ten agents at the house at any given point. (Doc. 45 at p. 14).

While agents were performing the protective sweep, Special Agent Bowen spoke with Defendant Ignacio and Patino in the living room. (T. 67). Special Agent Bowen first asked the men if they lived in the house. Patino answered that he did not live in the house, although he would occasionally come to visit. Because Patino said that he did not live at the house, Special Agent Bowen instructed another agent to take Patino to a different room. She wanted to separate the two men so that she could focus her attention on Defendant Ignacio. (T. 37, 39, 74). Special Agent Bowen's sole purpose in speaking to Defendant Ignacio was to obtain consent to search the house. (T. 76).

Defendant Ignacio told Special Agent Bowen that he lived in the house. (T. 37). He asked what the agents were doing at the house. Special Agent Bowen informed him that the house had come to their attention in a drug investigation. She also told him that marijuana was found in a vehicle that had just left the house. (T. 73). After this explanation and about five minutes of conversation, Defendant Ignacio gave consent to search the house to Special Agent Bowen. (T. 39-40, 74). He told her that it was

“okay.” (T. 117). Special Agent Bowen did not know if the protective sweep had been completed at the time she obtained consent from Defendant Ignacio. (T. 74-5).

About five minutes into the protective sweep, Special Agent Barnes came downstairs and told Special Agent Bowen that the agents had seen at least one gun in plain view in one of the bedrooms upstairs. (T. 39, 68, 73-74). Special Agent Barnes did not tell Special Agent Bowen, and Special Agent Bowen did not know, any other details about how or where the gun or guns were found. (T. 68). Approximately eight agents were in the house at that time. (T. 76).

At the time that Defendant Ignacio consented to the search he was scared and nervous because he did not know what was going on. He felt pressured and did not think that he could say no to the officers. (T. 109-110). He was confused because the officers were already in the house. (T. 108, 117).

Special Agent Bowen asked Defendant Ignacio which room he slept in and which room Patino slept in. Defendant Ignacio described the locations of the rooms in which they slept. (T. 40).

Special Agent Bowen then called TFO Lionel Martinez, a native Spanish speaker, and instructed him to come to the Northwinds house. When TFO Martinez arrived, Special Agent Bowen asked him to question the three suspects (Patino and Defendants Ignacio and Marco) who did not speak English. (80-81). By the time TFO

Martinez arrived there were about ten agents in the house and the search was still being conducted. (T. 86). Special Agent Bowen told TFO Martinez that the suspects were very evasive and uncooperative. (T. 82, 90-91).

TFO Martinez first read Defendant Ignacio his Miranda rights in Spanish. (T. 82). In response to questioning, Defendant Ignacio stated that he lived at the house and described the location of his bedroom. He also stated that Patino and Defendant Marco lived at the house. He then asked for an attorney, and the questioning stopped. (T. 84).

TFO Martinez next read Patino his Miranda rights. Patino also asked for an attorney, and TFO Martinez did not question him. (T. 85).

TFO Martinez then read Defendant Marco his Miranda rights in Spanish. Defendant Marco answered some questions, but eventually invoked his Miranda rights. (T. 85).

Additional facts are discussed in context below.

II. DISCUSSION

A. Defendant Ignacio's Motions to Suppress Evidence

Defendant Ignacio filed a motion to suppress the evidence found in his house. The well-known general rule is that a search of a private home without consent is unreasonable under the Fourth Amendment unless it has been authorized by a valid

search warrant. See Michigan v. Tyler, 436 U.S. 499, 506 (1978); Camara v. Mun. Ct. of City and County of San Francisco, 387 U.S. 523, 529 (1967). There is a presumption that a warrantless search of private property is per se unreasonable, unless the search falls within one of the clearly delineated exceptions to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). The “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” Payton v. New York, 445 U.S. 573, 585 (1980) (citation and internal quotation omitted).

Where the validity of a search rests on consent, the government has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given. Florida v. Royer, 460 U.S. 491, 497 (1983). The government also bears the burden of proving that the consent was not a mere submission to a claim of lawful authority. Id. at 497, 511. In deciding whether the government has met its burden, the court must consider the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). “In order for consent to a search to be deemed voluntary, it must be the product of an essentially free and unconstrained choice.” United States v. Garcia, 890 F.2d 355, 360 (11th Cir. 1989).

Factors that should be considered in evaluating the totality of the circumstances include a defendant’s awareness of his right to refuse consent, a defendant’s education

and intelligence, the extent of a defendant's cooperation with the agents, a defendant's belief that no incriminating evidence will be found, and the presence of coercive police procedures. United States v. Purcell, 236 F.3d 1274, 1281 (11th Cir. 2001).

Here, the agents did not inform Defendant Ignacio of his right to refuse consent, and he testified that he was unaware of his right to refuse consent. Defendant Ignacio had no prior experience with law enforcement during which he may have learned of this right. I find that he was not aware of his right to refuse consent.

As to defendant's education and intelligence, Defendant Ignacio was only twenty years old, did not progress past the third grade, and is unable to read or write in English or Spanish. Thus, he was far from a "reasonably educated, mature" person. Cf. United States v. Delancy, 502 F.3d 1297, 1308 (11th Cir. 2007) (noting that because defendant was reasonably educated and mature she understood the significance of her consent).

The government maintains that Defendant Ignacio demonstrated intelligence when he asked Special Agent Bowen what the agents were doing at the house and eventually asked for an attorney. I do not find that Defendant Ignacio demonstrated any significant degree of intelligence by asking the agents what they were doing at his house. Further, given that Defendant Ignacio only asked for an attorney after being told

by TFO Martinez that he could do so, his request does not show any particular sophistication or that he was previously aware of his rights.

The next factor is a defendant's cooperation with the agents. The government argues that Defendant Ignacio was cooperative because he was speaking calmly and politely with Special Agent Bowen when she requested permission to search the residence. However, TFO Martinez testified that Special Agent Bowen told him that the suspects, including Defendant Ignacio, were evasive and uncooperative. Accordingly, this factor also weighs against voluntary consent.

The next factor is the presence of coercive police procedures. The agents knew that people were in the house and were not coming to the door. Yet, the agents repeatedly and persistently approached and knocked on the door. The agents first approached the house at 9:00 p.m. and knocked for five minutes without getting the occupants to answer the door. They left and came back a second time with six police vehicles, two of which were marked State Patrol vehicles. They reapproached the door and knocked for several more minutes, again, without success in getting the occupants to answer the door. They left, came back a third time with four agents, and again knocked on the door, finally bringing the occupants to the door.

All of the agents were armed, with one carrying an assault rifle in a sling, and another holding a gun in his hand. As discussed above, agents entered the house before

obtaining consent to enter and quickly rushed upstairs. Once in the house, agents demonstrated their authority by separating the two occupants of the house before requesting further consent from Defendant Ignacio. The agents' persistence in approaching and knocking on the door with visible weapons would communicate to a reasonable occupant, and did communicate to Defendant Ignacio, that he was not free to ignore the officers. These and the other coercive elements weigh against a finding of voluntary consent.

Under a totality of the circumstances analysis, such as that employed to determine the voluntariness of consent, each case necessarily turns on its unique facts. See Schneckloth, 412 U.S. at 233 (ascertaining whether consent is voluntary involves "careful sifting of the unique facts and circumstances of each case"). It is not surprising, then, that the Eleventh Circuit has found voluntary consent in some cases despite the existence of some coercive factors that were not present in the instant case. However, of the relevant cases cited by the government, all are distinguishable from the present case in that the circumstances were overall less coercive, or contained indicia of voluntariness not present here.

For example, in United States v. Garcia, 890 F.2d 355, 360 n.4 (11th Cir. 1989), one of the cases cited by the government, the court found voluntary consent even where fourteen armed officers were present, defendant had been placed in handcuffs, and

agents persisted in seeking consent even though he had initially refused to give it. Id. at 361. However, in Garcia, the defendant had been arrested outside of his home and read his Miranda rights before he was asked to consent. Moreover, the defendant did not testify at the suppression hearing, and thus there was no evidence that he did not understand that he could refuse to consent.

Two other cases cited by the government are also distinguishable. In United States v. Ramirez-Chilel, 289 F.3d 744 (11th Cir. 2002), the defendant was specifically informed of his right to refuse consent, and there was no evidence that the defendant had a low level of education and intelligence. In United States v. Tobin, 923 F.2d 1506 (11th Cir. 1991), only two plain-clothed agents who did not display their weapons knocked on the defendant's door and called out to the defendant for three to four minutes. Once the occupant opened the door, the officers smelled marijuana and there were exigent circumstances that justified entry. Id. at 1512.

The case cited by Defendant Ignacio, United States v. Tovar-Rico, 61 F.3d 1529 (11th Cir. 1995), also is distinguishable in that the defendant in that case (Tovar) never consented to the protective sweep. As discussed above, Defendant Ignacio consented to the protective sweep after some agents had already entered his house. However, Tovar-Rico is more similar to the present case than the cases cited by the government.

In Tovar-Rico, at least five officers knocked at Tovar's door and requested

permission to enter. Id. at 1535. Tovar then opened the door, and the officers entered quickly with guns drawn to do a protective sweep. After the protective sweep, an officer then asked Tovar for permission to search the house. The officer informed Tovar that she did not have to permit the further search, but if she refused to consent the agents would return with a search warrant. Tovar then consented to the search and signed a written consent form. Id.

The Court of Appeals did not find fault with the magistrate judge’s opinion (apparently adopted by the district judge) that since “Tovar had already observed officers explore every room in the apartment [she] could not reasonably have known that she could still refuse a search.” Id. at 1536. The Eleventh Circuit affirmed the district court’s finding that the consent was not voluntary stating that it had “no doubt” that Tovar “opened the door in response to a ‘show of official authority’ and cannot be deemed to have consented to the agents’ entry or to have voluntarily consented to the search.” Id.

As did the court in Tovar-Rico, I find that the defendant could not have reasonably known that he could still refuse a search after he had observed the agents conduct a protective sweep of his house.⁶

⁶Protective sweeps are limited to cursory inspections of places where a person might be hiding. See, e.g., United States v. Bennett, 555 F.3d 962, 965 (11th Cir. 2009). The government did not present evidence that the protective sweep here was so

Considering the totality of the evidence, including Defendant Ignacio's testimony, I find that the circumstances here were more indicative of submission to a claim of lawful authority than to a voluntary consent. Accordingly, the government has not met its burden of proving that the consent was free and voluntary. I therefore **RECOMMEND** that Defendant Ignacio's Motion to Suppress Search and Seizure [Doc. 31] be **GRANTED**.

B. Defendant Ignacios's Motion to Suppress Statements

Defendant Ignacio also moves to suppress the statements he made after the agents entered the Northwinds house [Doc. 30].⁷ The government conceded at oral argument that if the agents lacked valid consent to enter the house, Defendant Ignacio's subsequent statements are suppressible as "fruit of the poisonous tree." As discussed

limited. (T. 68). Thus, any guns found during the protective sweep cannot be admitted into evidence solely on the basis of consent to a protective sweep.

The government's evidence also left open the possibility that agents remained in the house without justification after they completed the protective sweep and before they received further consent to search. Special Agent Barnes, the case agent who was in charge of the protective sweep, did not testify at the suppression hearing. As discussed above, Special Agent Bowen was focused on obtaining consent from Defendant Ignacio and did not know when the protective sweep had been completed. The government offers no justification for agents remaining in the house after the protective sweep and before obtaining further consent to search from Defendant Ignacio.

⁷Although neither of Defendant Ignacio's briefs addresses his Motion to Suppress Statements [Doc. 30], his attorney stated during oral argument that the omission was an unintentional oversight.

above, I find that the agents lacked valid consent to enter the house. Accordingly, I **RECOMMEND** that Defendant Ignacio's Motion to Suppress Statements [Doc. 30] be **GRANTED**.

C. Defendant Marco's Motion to Suppress Evidence Seized from Vehicle

Defendant Marco moves to suppress the evidence seized from the Pathfinder he was in at the time of the traffic stop. "A traffic stop, which is a seizure within the meaning of the Fourth Amendment, is constitutional if it is either based upon probable cause to believe a traffic violation has occurred or justified by reasonable suspicion in accordance with Terry [v. Ohio], 392 U.S. 1 [(1968)]." United States v. Spoerke, 568 F.3d 1236, 1248 (11th Cir. 2009) (internal quotations and citation omitted). The government argues that the agents had a reasonable suspicion sufficient to conduct a stop of Defendant Marco's vehicle as he drove away from the Northwinds house. Defendant Marco argues that the government lacked reasonable suspicion to stop the Pathfinder because (1) the wiretap involved a conversation between two individuals who were not at the Northwinds house, and (2) neither drugs nor drug proceeds were seen entering or leaving the Northwinds house.

The determination of whether a traffic stop is based on reasonable suspicion of criminal activity is based on the totality of the circumstances. United States v. Harris, 526 F.3d 1334, 1337 (11th Cir. 2008). Reasonable suspicion can be formed while

observing legal activity. Id. The officer must “be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion of a traffic stop. Terry, 392 U.S. at 21.

While not a model of clarity, TFO Krueger’s testimony provided sufficient specific and articulable facts to justify a stop of Defendant Marco’s vehicle. In 2009, agents observed participants in a drug transaction travel from a location south of Atlanta to the Northwinds neighborhood. The address of the Northwinds house was later “verified.” (T. 6-7). In May and June of 2009, TFO Krueger conducted surveillance at the Northwinds house at least once or twice a week, and frequently observed a gold Nissan Pathfinder at that house. In August of 2009, individuals from the Northwinds house participated in a transaction involving drugs and drug proceeds. (T. 43-44).

On October 19, 2009, agents seized 360 pounds of marijuana from a location in Griffin, Georgia. Conversations heard on wiretaps and surveillance connected individuals from the Griffin location with the Northwinds house. (T. 8). Agents knew from wiretaps that individuals associated with the marijuana seizure were “scrambling around and moving proceeds.” (T. 8-9). On the night of October 19th, after the seizure of the marijuana in Griffin, agents observed the gold Pathfinder leaving the Northwinds house. (T. 8).

The totality of these circumstances provided the officers with a reasonable suspicion sufficient to conduct a stop of Defendant Marco's vehicle as he drove away from the Northwinds house. Accordingly, I **RECOMMEND** that Defendant Marco's Motion to Suppress the evidence seized from the Pathfinder he was in at the time of the traffic stop be **DENIED**.

D. Defendant Marco's Motion to Suppress Statements

Defendant Marco made statements to agents at the scene of the traffic stop prior to being informed of his Miranda rights. He argues that these statements should be suppressed because he was subjected to custodial interrogation and was not informed of his Miranda rights.

The well-known general rule is that a person who is arrested and detained must be given full Miranda warnings in order for his statements, made in response to interrogation by a law enforcement officer, to be used against him in court. Miranda v. Arizona, 384 U.S. 436, 467-686 (1966).

Miranda warnings are required only when a defendant is interrogated while in custody. See Stansbury v. California, 511 U.S. 318, 322 (1994). To determine whether a suspect is in custody, the court must examine the objective circumstances from the perspective of a reasonable person in the defendant's position. Berkemer v. McCarty, 468 U.S. 420, 442 (1984). While courts consider the totality of the circumstances, "the

ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” Stansbury, 511 U.S. at 322 (internal marks and citation omitted); United States v. Acosta, 363 F.3d 1141, 1149 (11th Cir. 2004).

Here, TFO Krueger asked Defendant Marco to step out of his vehicle. He also asked to see Defendant Marco’s driver’s license. He retrieved a bag containing marijuana from the floorboard of the vehicle and then placed Defendant Marco in handcuffs. (T. 10, 17). TFO Krueger believed that Defendant Marco was “technically under arrest for the marijuana.” (T. 11). Several minutes later, in response to questions, Defendant Marco told Special Agent Bowen that he had been visiting friends at the Northwinds house, that his keys did not fit the house, and that he did not want to accompany the agents back to the house. Although Special Agent Bowen did not recall if Defendant Marco was in handcuffs when she was questioning him, (T. 33-4), the government conceded at oral argument that he was in handcuffs during the questioning. Defendant Marco was formally arrested after being questioned by Special Agent Bowen.

The government argues that Defendant Marco’s statements were not in-custody statements subject to Miranda and are therefore not suppressible. (Doc. 44 at p. 11). I acknowledge that persons who are temporarily detained pursuant to investigatory

stops are not necessarily in custody for the purposes of Miranda. Berkemer, 468 U.S. at 440; Acosta, 363 F.3d at 1148. Also, officers do not necessarily convert an investigatory stop into an arrest by handcuffing the detainee. See United States v. Kapperman, 764 F.2d 786, 790 n. 4 (11th Cir.1985). Where agents reasonably believe a person presents a danger to their safety, handcuffing is permitted. United States v. Hastamorir, 881 F.2d 1551, 1557 (11th Cir.1989) (handcuffing of person at a traffic stop permitted where reasonable agents believe a person presented risk to their safety). Whether a seizure has become too intrusive to be an investigatory stop and must be considered an arrest depends on the degree of intrusion, considering all the circumstances. U.S. v. Blackman 66 F.3d 1572, 1576 (11th Cir. 1995)

The government's brief fails to discuss the degree of intrusion on Defendant Marco during the stop. It makes no argument addressing the effect of, or public safety need for, the handcuffing of Defendant Marco prior to the questioning by Special Agent Bowen. The government also failed to address TFO Krueger's statement that Defendant Marco was "technically under arrest." The government has therefore failed to sustain its burden of showing that Defendant Marco's unwarned statements are admissible. Cf. Hastamorir, 881 F.2d at 1557; Acosta, 363 F 3d at 1150 (relying in part on fact that defendant was *not handcuffed* during detention in affirming denial of motion to suppress); United States v. Luna-Encinas, No. 08-12574, 2010 WL 1441105

at *6 (11th Cir. Apr. 13, 2010) (affirming denial of motion to suppress in part because defendant was *not handcuffed* during detention).

Therefore, Defendant Marco's Motion to Suppress (Doc. 33) should be **GRANTED** with respect to his statements made at the scene of the traffic stop.

Defendant Marco also made statements inside the Northwinds house to TFO Martinez. TFO Martinez began the questioning by reading Defendant Marco his Miranda rights in Spanish. Because Defendant Marco moves to suppress only those statements he made prior to being informed of his Miranda rights, these statements are not subject to his motion.

III. CONCLUSION

In sum, I **RECOMMEND** that Defendant Marco's Motions to Suppress Evidence [Doc. 32] be **DENIED** and his Motion to Suppress Statements [Doc. 33] be **GRANTED**. I further **RECOMMEND** that Defendant Ignacio's Motion to Suppress Statements [Doc. 30] be **GRANTED** and his Motion to Suppress Search and Seizure [Doc. 31] be **GRANTED**.

There are no pending matters before me, and I am aware of no problems relating to the scheduling of this case for trial. It is therefore **ORDERED AND ADJUDGED** that this action be declared **READY FOR TRIAL**.

It is so **ORDERED** and **RECOMMENDED**, this 4th day of May, 2010.

Gerrilyn G. Brill
GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA,

v.

**MARCO LARA-GONZALEZ and
IGNACIO LARA-GONZALEZ,**

Defendants.

CRIMINAL FILE NO.

1:09-CR-510-JEC-GGB

**ORDER FOR SERVICE OF
REPORT AND RECOMMENDATION**

Attached is the Report and Recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Criminal Local Rule 12.1(E).


Pursuant to 28 U.S.C. § 636(b)(1), within fourteen (14) days after service of this order, each party may file written objections, if any, to the Report and Recommendation. Pursuant to Title 18, United States Code, Section 3161(h)(1)(F), **the above-referenced fourteen (14) days allowed for objections is EXCLUDED from the computation of time under the Speedy Trial Act.**

Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible

for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S.Ct. 729 (1984).

The Clerk is directed to submit the Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED, this 4th day of May, 2010.



GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE