IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13992-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

HARRISON GARCIA,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: TJOFLAT, MARTIN, and TRAXLER,* Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

Boody B. Martin
UNITED STATES CIRCUIT JUDGE

*Honorable William B. Traxler, Jr., United States Circuit Judge for the Fourth Circuit, sitting by designation.

ORD-41

778 Fed.Appx. 779
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Harrison GARCIA, Defendant - Appellant.

No. 17-13992

(July 9, 2019)

Synopsis

Background: Following the denial of defendant's motion to suppress, 2017 WL 1194671, 2017 WL 1209941, 2017 WL 1194671, 2017 WL 1209941, defendant was convicted in the United States District Court for the Southern District of Florida of conspiracy to possess with intent to distribute marijuana, alprazolam, and promethazine with codeine, maintaining a drug-involved premises, possessing with intent to distribute alprazolam, and possession of a firearm in furtherance of drug trafficking crimes. The District Court, Patricia A. Seitz, Senior District Judge, 2017 WL 2987202, denied defendant's motions for acquittal and for a new trial. Defendant appealed.

Holdings: The Court of Appeals, Martin, Circuit Judge, held that:

any error in trial court crediting agent's version of events regarding whether defendant invoked his right to counsel the night of his arrest rather than defendant's version was not clear error;

social media posts and messages that defendant made were admissible as party admissions;

social media posts and messages by defendant, and others in response to defendant's messages, were not testimonial in nature;

government's failure to disclose the confession of an unindicted co-conspirator did not prejudice defendant;

defendant's prior adjudications for possession with intent to distribute drugs were admissible to prove defendant's intent;

trial court acted within its discretion by striking the testimony of a defense witness who, during cross-examination, invoked her Fifth Amendment right against self-incrimination; and

sufficient evidence supported firearm conviction for possessing firearms in furtherance of the crime of maintaining a drug-involved premises.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Post-Trial Hearing Motion; Pre-Trial Hearing Motion.

Attorneys and Law Firms

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Gustavo D. Lage, Sanchez-Medina Gonzalez & Quesada, Coral Gables, FL, for Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:16-cr-20837-PAS-1

Before TJOFLAT, MARTIN, and TRAXLER, * Circuit Judges.

Opinion

MARTIN, Circuit Judge:

Harrison Garcia was tried and convicted of three drug offenses and two firearms offenses. Mr. Garcia appeals the denial of his motion to suppress and six adverse trial rulings, as well as the sufficiency of the evidence supporting his firearms convictions. After careful review, and with the benefit of oral argument, we affirm.

I.

In late 2015, a confidential informant told law enforcement that Mr. Garcia was selling drugs. Officers began surveilling one of his residences on SW 29th Street in Miami, Florida. They also began monitoring his profile on the social media service Instagram, where they discovered Mr. Garcia posted photos of himself with drugs and firearms.

Based on the surveillance, officers decided to make two controlled drug buys with a confidential informant. At both buys, Mr. Garcia exchanged narcotics for money. A few weeks later, officers searched the garbage at the 29th Street house. The search turned up marijuana paraphernalia and empty bottles of promethazine with codeine (a high-strength cough syrup, known *783 by the slang "sizzurp" or "lean," that produces a mild feeling of euphoria).

With evidence from the controlled buys and the trash pull, officers got a warrant to search the 29th Street house and made a plan to arrest Mr. Garcia.

About 5:00 in the afternoon the day of the planned arrest, officers saw Mr. Garcia leave the 29th Street house with a backpack. He drove off in a Suburban with three other men. Some distance away, twenty agents stopped the Suburban, arrested Mr. Garcia, and seized his backpack. The backpack contained a Glock .380, a green baggie filled with marijuana and moon rocks, and Mr. Garcia's wallet and identification.

Once Mr. Garcia was secure, officers informed him they had a search warrant for the 29th Street house. They asked him for the keys to the 29th Street house to avoid breaking the door down, and Mr. Garcia handed them over.

Law enforcement then went to the 29th Street house and searched it. A Homeland Security Investigations (HSI) agent named Rimas Sliazas stayed with Mr. Garcia where he was arrested while other officers searched the house. In the search of the 29th

Street house, officers found marijuana; moon rocks; a digital scale with marijuana residue on it; and two firearms, a Glock 9 millimeter and an FN Five-Seven.

About two hours after his arrest, Agent Sliazas brought Mr. Garcia to the 29th Street house. Agent Sliazas and Kevin Selent, another HSI agent, Mirandized Mr. Garcia and asked for his consent to search the 29th Street house as well as a condo Mr. Garcia also owned. Mr. Garcia waived his Miranda rights, consented to the searches, and signed forms confirming the waiver and consent. Mr. Garcia also gave agents the passcodes to his cell phones. And he admitted he was en route to a drug transaction when he left the 29th Street house.

The officers then took Mr. Garcia to his condo, where he again handed over the key. After a search, agents seized "a couple thousand pills" of alprazolam (Xanax), two firearms—an AK-47 and a Uzi 9 millimeter—and several empty medicine bottles.

Over the course of the evening, Mr. Garcia admitted to owning all the drugs and firearms the officers found. He said he trafficked in narcotics to supplement his main source of income—working in the music industry. He used the proceeds from his drug sales to buy high-end cars and firearms. He said he used the firearms for protection from rival drug dealers.

Later, law enforcement extracted text messages from Mr. Garcia's phones. Those messages showed Mr. Garcia sold drugs by phone and had photographs of promethazine with codeine.

II.

The government indicted Mr. Garcia on five counts. Three counts charged drug crimes: conspiracy to possess with intent to distribute marijuana, alprazolam (Xanax), and promethazine with codeine, in violation of 21 U.S.C. § 846; maintaining a drug-involved premises, in violation of 21 U.S.C. § 856; and possessing with intent to distribute Xanax, in violation of 21 U.S.C. § 841. The two remaining counts charged Mr. Garcia with possessing a firearm in furtherance of drug trafficking crimes, in violation of 18 U.S.C. § 924(c). One of the § 924(c) counts charged possession of the F.N. Five-Seven, Glock 9 millimeter, and Glock .380 in furtherance of maintaining the drug involved premises, the 29th Street house. The other charged possession of the AK-47 and Uzi 9 millimeter found in Mr. Garcia's condo in furtherance *784 of possessing with intent to distribute Xanax.

Mr. Garcia filed a motion to suppress the statements he made after his arrest, claiming he invoked his right to counsel as soon as he was arrested. [1] A magistrate judge held a hearing on the motion and heard Mr. Garcia's testimony. The magistrate judge issued a Report and Recommendation finding Mr. Garcia's testimony that he invoked his right to counsel was not believable. The District Court adopted the Report and Recommendation and denied Mr. Garcia's motion to suppress his post-arrest statements based on the adverse credibility finding of the magistrate judge.

Mr. Garcia moved to reconsider the denial of his suppression motion, asserting, among other things, that his testimony that he invoked his right to counsel was "unrebutted." The District Court held a hearing on the reconsideration motion during which Mr. Garcia withdrew his motion. The District Court issued a supplemental order, again adopting the magistrate judge's finding that Mr. Garcia never invoked his right to counsel.

Mr. Garcia proceeded to trial, and the jury convicted him of all counts. The District Court denied all post-trial motions and sentenced Mr. Garcia to a total of 30 years and one day in prison. The District Court imposed concurrent one day sentences for each of the drugs convictions. As the District Court was required by law to do, it imposed a five-year sentence on the first §

924(c) count and twenty-five years on the second one, to run consecutively to each other. The District Court set the one-day sentences for the drug counts to run consecutively to the sentences on the firearms counts.

This appeal followed.

III.

We begin with Mr. Garcia's appeal of the denial of his motion to suppress. "Review of a denial of a motion to suppress is a mixed question of law and fact." United States v. Bennett, 555 F.3d 962, 964 (11th Cir. 2009) (per curiam). This Court "review[s] de novo the district court's application of the law to the facts" but reviews "factual findings only for clear error, construing all facts in the light most favorable to the prevailing party below." Id. at 964–65.

Mr. Garcia took the stand at the suppression hearing and testified he invoked his right to counsel three times the night of his arrest: once immediately after his arrest, once inside the 29th Street house, and once after he received Miranda warnings. If indeed Mr. Garcia had made these invocations of his right to counsel, the officers would have violated his Fifth Amendment rights by continuing to question him. See Edwards v. Arizona, 451 U.S. 477, 481–84, 101 S. Ct. 1880, 1883–85, 68 L.Ed.2d 378 (1981). However, the District Court found, as the decider of fact, that Mr. Garcia did not ask for a lawyer. The District Court did not believe Mr. Garcia's testimony and instead credited Agent Sliazas's version of events. Agent Sliazas testified he stayed with Mr. Garcia from the time of the arrest until the time of the Miranda warnings. According to Agent Sliazas, Mr. Garcia never asked for a lawyer in his presence, before or after the Miranda warnings.

***785** Crediting Agent Sliazas's version of events was not clear error, particularly in light of the deference we afford trial court credibility determinations. See United States v. McPhee, 336 F.3d 1269, 1275 (11th Cir. 2003). We affirm the denial of the motion to suppress.

IV.

We turn now to the six trial rulings that are the subject of Mr. Garcia's appeal. If a defendant preserves his objection, we review evidentiary rulings for abuse of discretion. United States v. Mitrovic, 890 F.3d 1217, 1220 (11th Cir. 2018). We also review for abuse of discretion a district court's decision to strike witness testimony when the witness invokes her Fifth Amendment right against self-incrimination. See United States v. McKneely, 69 F.3d 1067, 1076 (10th Cir. 1995). A district court abuses its discretion when it makes a clear error of judgment or applies the wrong legal standard. United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). An erroneous evidentiary ruling will not necessitate reversal unless "the resulting error was not harmless." Mitrovic, 890 F.3d at 1220; see also Fed. R. Crim. P. 52(a). An error is harmless if it "had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict." United States v. Barton, 909 F.3d 1323, 1331 (11th Cir. 2018) (quotation marks omitted).

We review rulings to which the defendant did not object for plain error. Frazier, 387 F.3d at 1268 n.21. To show plain error, the defendant must show "(1) there is an error; (2) the error is plain or obvious; (3) the error affects the defendant's substantial rights in that it was prejudicial and not harmless; and (4) the error seriously affects the fairness, integrity, or public reputation of a judicial proceeding." Id. If the defendant invited the error, the invited error doctrine applies, and "the Court is precluded from reviewing that error on appeal." United States v. Brannan, 562 F.3d 1300, 1306 (11th Cir. 2009) (quotation marks omitted).

As we explain, none of the rulings Mr. Garcia challenges were error, plain or otherwise. Also, Mr. Garcia invited a fair number of the rulings he now calls error.

A.

Mr. Garcia first challenges the admission of Instagram posts, Instagram direct messages, and text messages. He says the posts and messages were not authenticated, were hearsay, were more prejudicial than probative under Federal Rule of Evidence 403, and were admitted in violation of the Sixth Amendment Confrontation Clause. But beyond stating the bald claim, he offers argument only on his claim that the posts and messages were not authenticated. He also says it was error to allow Agent Selent to testify to slang terms in the posts and messages. Our review reveals no error.

Mr. Garcia stipulated to the admissibility of the text messages and phone data, so he cannot now challenge their admission. The Instagram posts and messages were properly authenticated by a records custodian, as Mr. Garcia acknowledged at the pretrial conference. Mr. Garcia makes no argument to this Court that the posts and messages were hearsay or were more prejudicial than probative, so he has abandoned any challenge he may have had to them. See Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 681–82 (11th Cir. 2014). Even if he had offered arguments, the posts and messages would be admissible. Any post Mr. Garcia made or message he sent could be admitted into evidence as a party admission under Federal Rule of Evidence 801(d)(2). Messages ***786** he received in response could serve the non-hearsay purpose of providing context for the conversation. See United States v. Price, 792 F.2d 994, 996–97 (11th Cir. 1986). We see no basis for holding that the District Court abused its discretion in allowing the posts and messages in under Rule 403. Cf. Aycock v. R.J. Reynolds Tobacco Co., 769 F.3d 1063, 1069 (11th Cir. 2014) (noting "a district court's discretion to exclude evidence under Rule 403 is narrowly circumscribed" with the "balance ... struck in favor of admissibility" (quotation marks omitted)).

Neither did admitting the posts and messages violate the Confrontation Clause. The Confrontation Clause bars admission of "testimonial statements," or statements made for the purpose of establishing some fact for use in a prosecution. See Crawford v. Washington, 541 U.S. 36, 51–54, 124 S. Ct. 1354, 1363–65, 158 L.Ed.2d 177 (2004). The posts and messages were not testimonial by that standard. There is no indication anyone made a post or sent a message with the expectation the post or message would be used in a prosecution.

As for Mr. Garcia's other argument, he did not object to the bulk of Agent Selent's testimony interpreting slang in the posts, objecting only to Agent Selent's explanation that "choppa" means AK-47. Taking the unobjected-to testimony first, we see no plain error. The unobjected-to testimony concerned drug and firearms slang. "The operations of narcotics dealers, including drug codes and jargon, are proper subjects of expert testimony." United States v. Emmanuel, 565 F.3d 1324, 1335 (11th Cir. 2009). Agent Selent testified that he had years of law enforcement experience and familiarity with drug and firearms terminology. On this record, and in the absence of an objection, there was no plain error in admitting Agent Selent's testimony. See Frazier, 387 F.3d at 1268 n.21. Nor do we see anything that would call into question the integrity or reputation of the judiciary. See id. In any event, the government put on an expert whose testimony to the meaning of various slang terms was consistent with Agent Selent's testimony. Mr. Garcia does not challenge that expert's testimony on appeal, so even if there had been error, it was harmless.

As to admitting the objected testimony regarding the meaning of "choppa," we see no abuse of discretion. Mr. Garcia objected to the "predicate" for Agent Selent knowing that "choppa" means AK-47. Agent Selent then testified to his law enforcement experience and familiarity with firearms slang. That was a sufficient basis to admit the "choppa" testimony.

B.

Mr. Garcia next challenges testimony Agent Selent gave regarding a confession made by an unindicted co-conspirator. The confession was taped but neither the tape nor the existence of the tape were disclosed to the defense. Mr. Garcia says this failure to disclose violated Federal Rule of Criminal Procedure 16 and requires a new trial. He says Agent Selent's testimony about the confession was hearsay, violated his Confrontation Clause rights, and was not the best evidence of the co-conspirator's statement. Each of these arguments fail.

At the outset, we note that Mr. Garcia himself elicited the testimony he now says requires a new trial. Agent Selent testified the co-conspirator accompanied Mr. Garcia to one of the controlled buys. Mr. Garcia's attorney asked if Agent Selent knew whether the associate knew Mr. Garcia took drugs to sell. Agent Selent responded he did. Asked how he knew that, Agent *787 Selent said the associate came to his office and offered a full confession, which was taped. He acknowledged the taped confession was not provided to Mr. Garcia for his defense.

Rule 16 requires the government to disclose the defendant's oral, written, or recorded statement. Fed. R. Crim. P. 16(a)(A), (B). It does not require disclosure of the statement of an unindicted co-conspirator. See id. The District Court correctly ruled there was no discovery violation in the nondisclosure of the confession. In order to prevail on a Rule 16 challenge, a defendant must show both a violation and prejudice. United States v. Noe, 821 F.2d 604, 607 (11th Cir. 1987). Mr. Garcia has shown no prejudice. He says the confession "surprised" him, but he has not demonstrated how his strategy would have changed if the government disclosed the confession. Cf. id. at 606–09 (vacating a conviction where the government failed to disclose the defendant's recorded statement and then used it for impeachment). The District Court did not abuse its discretion in denying a mistrial.

The hearsay, Confrontation Clause, and best evidence arguments fare no better.[2] Mr. Garcia, not the government, elicited the testimony he now says is hearsay, so he invited the confession's admission, and we will not review it. See United States v. Parikh, 858 F.2d 688, 695 (11th Cir. 1988) ("We hold that the admission of out of court statements by a government witness, when responding to an inquiry by defense counsel, creates 'invited error.' "). In any event, the evidence had a plain non-hearsay purpose, made obvious by the question Mr. Garcia's attorney asked. The question was intended to show how Agent Selent knew that the associate knew Mr. Garcia sold drugs at the controlled buys. The Confrontation Clause was not violated because it "is not implicated where the defendant seeks to introduce hearsay declarations as part of his defense." Id. And, finally, the best evidence rule plainly does not apply. The best evidence rule requires admission of an original recording to prove the recording's content. Fed. R. Evid. 1002. Agent Selent testified not to the content of the recording, but to the content of a conversation he was a party to. See United States v. Howard, 953 F.2d 610, 612 (11th Cir. 1992) (per curiam). That was proper.

C.

Mr. Garcia next challenges the admission of Instagram posts and messages that described an incident in which he shot an AK-47 at someone. He says their admission violated Federal Rule of Evidence 404(b), which prohibits the admission of prior bad acts to prove conduct in conformity with those bad acts. This argument fails as well.

First, Mr. Garcia did not object on 404(b) grounds below. There was certainly no plain error in admitting the posts and messages. No precedent suggested to the District Court it would abuse its discretion by admitting this evidence under Rule 404(b). See

United States v. Ramirez-Flores, 743 F.3d 816, 822 (11th Cir. 2014) (noting that "[a]n error is 'plain' if controlling precedent from the Supreme Court or the Eleventh Circuit establishes that an error has occurred"). Anyway, the post and messages serve a purpose other than proving propensity to use firearms. They show access to and knowledge of how to use an AK-47. Rule 404(b) allows the ***788** admission of prior bad acts evidence to prove facts like these. See Fed. R. Evid. 404(b)(2). It was not plainly wrong to admit this evidence.

D.

Mr. Garcia next argues it was error to admit two prior withheld adjudications for possession with intent to distribute drugs. Pointing to United States v. Clarke, 822 F.3d 1213 (11th Cir. 2016) (per curiam), he says withheld adjudications do not count as convictions under Florida law and are not admissible under Rule 404(b) for this reason. He also says their admission violated the Confrontation Clause. And finally, he says the government cannot use his past convictions to prove his guilt of the instant offense. These arguments fail.

Taking these arguments in reverse order, Mr. Garcia is of course correct that the government cannot use past convictions to prove guilt of the present offenses. See Michelson v. United States, 335 U.S. 469, 475–76, 69 S. Ct. 213, 218, 93 L.Ed. 168 (1948). But under this Court's precedent, the government was permitted to use prior bad acts to prove Mr. Garcia's intent, which he had put at issue by pleading not guilty. See United States v. Calderon, 127 F.3d 1314, 1332 (11th Cir. 1997). Admitting the withheld adjudications did not run afoul of Michelson.

Allowing admission of the withheld adjudications did not violate the Confrontation Clause, either. This is for the same reason admitting the Instagram posts and messages did not: there is no indication the withheld adjudications are testimonial. See Crawford, 541 U.S. at 51–54, 124 S. Ct. at 1363–65.

And, finally on this point, Mr. Garcia's reliance on Clarke is inapposite. Clarke concerned whether a withheld adjudication counts as a "conviction" under Florida law for purposes of violating the federal felon-in-possession statute, 18 U.S.C. § 922(g). Clarke, 822 F.3d at 1214. Whether the withheld adjudication counts as a conviction under Florida law is irrelevant to the Rule 404(b) analysis. Rule 404(b) allows admission of "evidence of a crime, wrong, or other act" to show something other than propensity, such as "motive, opportunity, [or] intent." Fed. R. Evid. 404(b) (emphasis added). The withheld adjudications were plainly evidence of a prior bad act even if they were not convictions under Florida law. They were thus admissible under Rule 404(b).

E.

Mr. Garcia says the District Court abused its discretion in striking the testimony of a defense witness who during cross-examination invoked her Fifth Amendment right against self-incrimination. Again here, there was no abuse of discretion.

If a witness invokes her right against self-incrimination during cross-examination, "all or part of that witness's direct testimony may be subject to a motion to strike." Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967).[3] "Striking the testimony of a witness is a drastic remedy not lightly invoked." McKneely, 69 F.3d at 1076. But it "may be the only appropriate remedy

when refusal to answer the questions of the cross-examiner frustrates the purpose of the process." Lawson v. Murray, 837 F.2d 653, 656 (4th Cir. 1988).

*789 The witness's invocation here left the government with no opportunity to test the truth of her testimony. On direct examination, she said she never saw Mr. Garcia sell drugs from the 29th Street house. But in the middle of cross-examination, she invoked the Fifth Amendment in response to questions about photographs of drugs in the 29th Street house. After finding counsel for the witness, the District Court allowed the government to continue examining her outside the jury's hearing. The witness continued to invoke the Fifth Amendment, even in response to a question about whether she recognized the room where the government found drugs and firearms. It was no abuse of discretion to strike the witness's testimony in these circumstances.

F.

Mr. Garcia argues the government made an improper golden rule argument in closing. He says this necessitated a mistrial.

During the closing argument, the government explained possession as follows: "[T]here are two types of possession; actual possession, the way [Mr. Garcia] possessed that AK-47 that the defendant used to possess, or constructive possession, the way you or I possess the things that are at home right now." This is not a golden rule argument. "A 'golden rule' argument asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." Grossman v. McDonough, 466 F.3d 1325, 1348 (11th Cir. 2006) (quotation marks omitted). The challenged argument did none of these things, nor did it otherwise appeal to the "passions or prejudices of the jurors." United States v. Bailey, 123 F.3d 1381, 1400 (11th Cir. 1997). It was no abuse of discretion to deny a mistrial based on the government's definition of "possession" here.

G.

Mr. Garcia also invokes the cumulative error doctrine. "The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." United States v. Capers, 708 F.3d 1286, 1299 (11th Cir. 2013) (quotation marks and alteration omitted). Because Mr. Garcia has established no error, let alone cumulative error, this argument fails.

V.

We now turn to Mr. Garcia's challenge to the sufficiency of the evidence supporting his two firearms convictions. We review de novo the sufficiency of the evidence, drawing all reasonable inferences and credibility evaluations in favor of the verdict. United States v. Frank, 599 F.3d 1221, 1233 (11th Cir. 2010). "A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence." Id. (quotation marks omitted). We conclude sufficient evidence supports both firearms convictions.

Mr. Garcia was charged with two counts of violating 18 U.S.C. § 924(c), which prohibits knowingly possessing a firearm in furtherance of any drug trafficking crime for which he could be prosecuted in the courts of the United States. United States v. Woodard, 531 F.3d 1352, 1362 (11th Cir. 2008); see also 18 U.S.C. § 924(c). A firearm is possessed "in furtherance of" a drug

trafficking crime when it "helped, furthered, promoted, or advanced the drug trafficking." Woodard, 531 F.3d at 1362 (quotation marks omitted). The in-furtherance ***790** inquiry considers the totality of the circumstances, including such factors as:

> the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to the drugs or drug profits, and the time and circumstances under which the gun is found.

United States v. Timmons, 283 F.3d 1246, 1253 (11th Cir. 2002) (quotation marks omitted). The mere possession of a firearm during a drug trafficking crime will not suffice; there must be a "nexus" between the firearm and the drug trafficking activity. Id.

One of the § 924(c) counts charged Mr. Garcia with possessing firearms in furtherance of the crime of maintaining a drug-involved premises. One of the firearms charged under that count was the Glock .380 found in the backpack Mr. Garcia was carrying the day he was arrested. Officers saw Mr. Garcia carrying the backpack when he left the 29th Street house, and the Glock was loaded when Mr. Garcia was arrested with it. The backpack also contained drugs resembling those Mr. Garcia sold during the controlled buys. An agent testified that Mr. Garcia admitted after his arrest that he was on the way to sell drugs. The two other firearms charged in that count, a Glock 9 millimeter and an FN Five-Seven, were found right next to the drugs in the 29th Street house. Both were loaded.

The other § 924(c) count charged Mr. Garcia with using firearms in furtherance of the crime of possessing with intent to distribute Xanax. The two firearms charged in this count, an Uzi 9 millimeter and an AK-47, were both found loaded in Mr. Garcia's condo. The AK-47 was in plain view. The guns were both near a closet with bottles of Xanax inside.

According to an agent, Mr. Garcia admitted to possessing all the firearms law enforcement found. The government also called an expert who testified that drug dealers frequently keep firearms near their drugs or drug proceeds for protection.

This evidence was sufficient for a reasonable jury to convict Mr. Garcia under this Court's precedent. See United States v. Lopez-Garcia, 565 F.3d 1306, 1322 (11th Cir. 2009) (finding sufficient evidence for a § 924(c) conviction where the defendant was found in bed along with a gun, methamphetamine, and several hundred dollars cash); United States v. Mercer, 541 F.3d 1070, 1077 (11th Cir. 2008) (per curiam) (finding sufficient evidence for a § 924(c) conviction where a gun was found "in the same room where a jury could infer drugs were being packaged for sale and available in the immediate vicinity of items commonly used in a drug operation"); United States v. Suarez, 313 F.3d 1287, 1292–93 (11th Cir. 2002) (finding sufficient evidence for a § 924(c) conviction where the defendant kept multiple firearms throughout a house that was used to traffic cocaine into the United States); Timmons, 283 F.3d at 1253 (finding sufficient evidence for a § 924(c) conviction where two fully loaded firearms were near crack cocaine on a stove).

VI.

We **AFFIRM** Mr. Garcia's convictions.

All Citations

778 Fed.Appx. 779

Footnotes

* Honorable William B. Traxler, Jr., United States Circuit Judge for the Fourth Circuit, sitting by designation.

1 Below, Mr. Garcia also contended the search warrant contained false statements that rendered it invalid under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978), but he does not press that argument on appeal.

2 Mr. Garcia also suggests the testimony of another HSI agent, Agent Sonn, was hearsay. But Agent Sonn testified outside the jury's hearing, so nothing he said could have swayed the verdict.

3 In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

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2017 WL 1209941
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

UNITED STATES of America, Plaintiff,

v.

Harrison GARCIA, Defendant.

CASE NO. 16-20837-CR-SEITZ/TURNOFF

Signed 03/29/2017

Filed 03/30/2017

Attorneys and Law Firms

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Barbara Perez Munoz, Miami, FL, Michael David Becker, Fort Lauderdale, FL, Theodore George Mastos, Coral Gables, FL, for Defendant.

AMENDED ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION

PATRICIA A. SEITZ, UNITED STATES DISTRICT JUDGE

***1** THIS MATTER is before the Court on a Report and Recommendation [DE 76] denying Defendant Garcia's Motion to Suppress. [DE 26.] Garcia filed objections to the Report [DE 82], to which the Government responded. [1] [DE 86.] The Court conducted a *de novo* review of the record, including the objections, the response and the transcript of the Suppression Hearing, dated January 23, 2017. The Court entered its original Order affirming the Report and denying the Motion to Suppress on March 16, 2017. [DE 92.] Thereafter, Garcia filed a Motion for Reconsideration. [DE 95.] The Court set an evidentiary hearing for March 29, 2017. At the hearing, Garcia represented to the Court that he was unable to secure the appearance of his witnesses. Garcia subsequently withdrew his Motion for Reconsideration. With the benefit of the supplemental hearing, the Court amends its original Order with regards to Section C. The Court reaffirms the Report's factual findings and legal conclusions. The Motion is therefore denied.

BACKGROUND

Garcia is charged with five counts: conspiracy to possess with intent to distribute controlled substances, maintaining a drug-involved premises, possession with intent to distribute controlled substances, and two counts of possession of a firearm in furtherance of a drug-trafficking crime. [DE 10.] Garcia was stopped while driving and arrested without a warrant on October 18, 2016, at 5:50 PM. Upon his arrest, agents from Homeland Security Investigations (HSI) searched Garcia's vehicle. Thereafter, they returned with him to a spot outside a house located at 7751 SW 29th Street, Miami, Florida ("target residence"), as a search warrant of that residence was being executed. The search revealed various firearms, bags of marijuana and other narcotics, U.S. currency and drug paraphernalia. [DE 1 at 2-3.] At approximately 7:30 PM, Garcia was advised of his *Miranda* rights and

allegedly signed a *Miranda* Statement of Rights Waiver Form and admitted to selling narcotics. He also purportedly gave verbal and written consent for agents to search (1) a second residence, (2) a commercial storage unit, and (3) all of Garcia's cellular phones. These searches revealed additional evidence of narcotics distribution and firearms possession. [DE 1 at 3-4.]

Garcia filed a Motion to Suppress on December 26, 2016. He moved to suppress evidence obtained from two search warrants,[2] arguing that both warrant applications contained false statements and relied on an unreliable informant. He also moved to suppress evidence seized from his vehicle, arguing that agents lacked probable cause to stop and arrest him. In addition, Garcia moved to suppress his post-*Miranda* statements and all evidence seized pursuant to his consent to search. He asserted (1) his three requests for an attorney were ignored, and (2) he never signed the waiver and consent to search forms.

*2 On January 5, 2017, Magistrate Judge Turnoff scheduled an evidentiary hearing for January 23, 2017. On January 20, 2017, Garcia requested a continuance of the hearing so that his counsel could have additional time to prepare. [DE 45.] Judge Turnoff denied the continuance[3] and, after reviewing Garcia's Motion, limited the scope of the hearing to Garcia's alleged *Miranda* waiver and consent to search. [Hr'g Tr. 19:15-25; 20:1-2.] Both Garcia and the arresting officer, Agent Rimas Sliazas, testified at the hearing.

DISCUSSION

The Report recommends denying Garcia's motion. With regards to the search warrants, the Report found the warrant applications to be valid, denied Garcia's request for a *Franks* hearing and confirmed that probable cause existed to issue both search warrants. As to the arrest, the Report found that HSI agents had probable cause to arrest Garcia and search his vehicle based on the warrant applications, including two controlled narcotics purchases and a trash pull; and the search warrant returns. As to the post-*Miranda* statements and searches, the Report found that Garcia voluntarily signed and executed the waiver and consent to search forms.

A. The Search Warrants

Garcia objects to the finding of probable cause for the searches, arguing that he had no opportunity to challenge the search warrants at the suppression hearing. His objection disregards the fact that he exercised his right to challenge the search warrants when he filed his Motion to Suppress. While long on the law, the Motion fails to tie the law to any specific relevant facts. Where a motion to suppress fails to show that relief is warranted, the Court may exercise its discretion and decline to hold a hearing. *United States v. Cooper*, 203 F.3d 1279, 1285 (11th Cir. 2000). Judge Turnoff held a hearing, but at the outset of the hearing found the search warrants and supporting affidavits to be valid, [Hr'g Tr. 14:1-2; 15:23-25], and limited the scope of the hearing to other issues. [Hr'g Tr. 19:15-25; 20:1-2.] Garcia did not object, and in fact, tacitly agreed that the hearing should be focused on his alleged *Miranda* waiver and consent to search. [Hr'g Tr. 13-15.]

Moreover, Garcia fails in his Motion to point out a single false statement or material omission in the warrant applications. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978) (requiring the defendant to make a preliminary showing that a material omission or false statement in the warrant application altered the probable cause showing). He merely makes conclusory allegations that the affidavits contain misrepresentations without specifying the facts being misrepresented or omitted. The thrust of his argument is that the affidavit did not detail the confidential informant's reliability. However, Garcia provides no evidence to show that the controlled narcotics purchases were unreliable. Nor does he address the other evidence establishing probable cause. Thus, Garcia did not meet his threshold burden. Therefore, the warrant applications are valid and the *Franks* hearing was properly denied.

B. Garcia's Arrest and Vehicle Search

*3 Garcia objects to the finding of probable cause for his arrest, arguing that agents lacked "first hand reliable knowledge" of illegal activity.[4] However, "first hand reliable knowledge" is not the standard for probable cause. Moreover, the record reveals that agents had ample knowledge of suspected criminal activity to establish probable cause. Garcia previously pled guilty with adjudication withheld for two separate narcotics charges. [DE 35-3 at 7.] HSI agents had been observing Garcia's Instagram account—"Muhammad_a_lean,"—since February 2016. [DE 35-3 at 6.] The account contained multiple photos of Garcia alongside bottles of promethazine with codeine, marijuana, firearms and U.S. currency. *Id.* at 6-7. Records provided by Instagram on October 12, 2016, revealed conversations between Garcia and others apparently negotiating the sale of narcotics. [DE 35-4 at 5.] In August and September 2016, agents conducted two audio- and video-recorded controlled purchases of narcotics from Garcia using a documented confidential informant.[5] [DE 35-3 at 6-8.] A trash pull at the target residence on October 12, 2016, retrieved empty bottles of promethazine with codeine and marijuana paraphernalia. [DE 35-4 at 6.] The record above meets the standard for probable cause.[6] *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996) (finding probable cause to arrest when the facts within an agent's knowledge, based on reasonably trustworthy information, would cause a reasonable belief that a crime has been committed). Given that probable cause existed to arrest Garcia for drug crimes, agents also had probable cause to search his vehicle. *See* *Thornton v. United States*, 541 U.S. 615, 632 (2004) (holding that officers have probable cause to search a vehicle when a suspect is removed from his vehicle and arrested for drug crimes).

C. Garcia's Request for Counsel

This issue presents a direct conflict in the evidence. Garcia claims that he requested counsel three times prior to executing the waiver form—once upon his arrest, once while inside the target residence, and once after being advised of his *Miranda* rights. By contrast, the Government maintains that Garcia never requested an attorney. The Report did not make a specific finding on this claim. The Report focused on the voluntariness of Garcia's *Miranda* waiver and consent to search. The Court reviews the request for counsel claim *de novo.*

Once a suspect in custody asks to speak to an attorney, he may not be subjected to further interrogation until counsel is present, unless he intiates further conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981). Garcia testified that he requested an attorney three times: (1) as he was taken into custody [Hr'g Tr. 79:14-15]; (2) while inside the target residence following his arrest [Hr'g Tr. 85:8-19; 86:7-10]; and (3) as Agent Selent was reading the waiver form outside the target residence.[7] [Hr'g Tr. 87:8-13; 91:7-19.] Garcia maintains that the arresting agent, Agent Sliazas, was not present when his three requests were made. Agent Sliazas on the other hand testified he was with Garcia from the time of his arrest and that he never took Garcia into the residence. [Hr'g Tr. 55:4-5; 59:15-23.] According to Agent Sliazas, Garcia never requested an attorney in his presence, [Hr'g Tr. 32:11-13; 67:2-4, 19-21], and in fact, verbally indicated his intent to cooperate. [Hr'g Tr. 36:15-23.]

*4 The conflicting accounts require a classic credibility assessment. Magistrate Judge Turnoff discredited Garcia's testimony in light of his explanation of his prior drug offenses, his previous *Miranda* waivers, and his access to the target residence. [DE 76 at 19-23.] Judge Turnoff had the ability to observe both witnesses' demeanor while testifying as well as consider their respective reasons not to tell the truth, their prior respect for the law and their ability to answer questions directly. After reviewing the hearing transcript, the Court finds Judge Turnoff's credibility assessment to be believable and applies the assessment here. *See* *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002) (deferring to the magistrate judge's credibility determinations unless his understanding of the facts appears to be unbelievable). Moreover, the credibility of Agent Sliazas is bolstered by the undisputed testimony as to Garcia's efforts to cooperate with agents by providing them access to the second

residence and his cellular phones. Based on all the testimony, the Court finds that, contrary to his testimony, Garcia did not ask to speak to an attorney; thus his right to counsel was not violated.

D. Waiver and Consent

Garcia objects to the finding that he voluntarily waived his *Miranda* rights. First, he argues there are no video or audio recordings of him waiving his rights. However, the Government need only prove by a preponderance of the evidence that a suspect knowingly, intelligently and voluntarily waived his rights. *United States v. Chirinos*, 112 F.3d 1089, 1102 (11th Cir. 1997); *see also United States v. Goodman,* 147 Fed.Appx. 96, 102 (11th Cir. 2005) ("There is no requirement that an interview be recorded, even if a video camera is available[.]").

1. Garcia's consent was voluntary.

Garcia argues that his consent to search was the product of coercion by law enforcement. Specifically, he contends that he was surrounded by armed guards and that his consent was a "submission to apparent authority" rather than voluntary consent. The voluntariness of consent is a question of fact determined in light of the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Relevant factors include the use of coercive procedures, the extent of the person's cooperation, his awareness of the right to refuse consent, and his education and intelligence. *United States v, Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001).

Agent Sliazas testified, and Garcia does not dispute, that at the time the consent form was read, Garcia was not in handcuffs, he was outside the target residence and agents had holstered their weapons. [Hr'g Tr. 36:2-14.] Agent Sliazas also testified that he removed his body armor shortly after the arrest, [Hr'g Tr. 31:9-20], took steps to make sure that Garcia was not injured [Hr'g Tr. 28:10-24], and offered him food and water. [Hr'g Tr. 43:10-16.] Garcia was relaxed and did not appear to be under the influence of alcohol, and had a command of the English language. [Hr'g Tr. 38:3-19; 58:18-23.]

Garcia on the other hand testified that he had no intention to cooperate but "felt like [he] was against the wall." [Hr'g Tr. 92:2-3.] However, as noted above, Magistrate Judge Turnoff discredited Garcia's statements in light of his entire testimony. [DE 76 at 19-23.] The Court finds Judge Turnoff's assessment to be reasonable; and declines to accept Garcia's testimony in this regard. Based on Agent Sliazas' testimony, it appears Garcia's consent was voluntary.

2. Garcia's consent included the second apartment, the storage unit and his cellular phones.

Garcia further argues that the consent form does not sufficiently specify the property to be searched. The form listed the street address of the second residence without identifying an apartment number, an unidentified "storage location," and Garcia's cellular phones. When a defendant gives a general statement of consent, the scope of the permissible search "is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass." *United States v. Street*, 472 F.3d 1298, 1308 (11th Cir. 2006); *see also United States v. Milian-Rodriguez*, 759 F.2d 1558, 1564 (11th Cir. 1985) (noting that a defendant's additional description of property to be searched provides additional evidence of his consent). While the consent form does not list an apartment number for the second residence or an address for the storage unit, Agent Sliazas testified that Garcia provided these locations to law enforcement. In addition, Garcia provided law enforcement with the passwords necessary to access his cell phones. [Hr'g Tr. 46:1-25; 73:6-25; 74:1-12.] Given his assistance in locating the areas to be searched, it was reasonable for agents to believe that Garcia consented to those searches.

***5** Therefore, it is

ORDERED THAT:

(1) Garcia's Objections to the Report and Recommendation [DE 82] are **OVERRULED.**

(2) The Report and Recommendation [DE 76] is **AFFIRMED AND ADOPTED.**

(3) Defendant Garcia's Motion to Suppress [DE-26] is **DENIED.**

DONE and ORDERED in Miami, Florida, this 29th day of March, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 1209941

Footnotes

1 Garcia filed an untimely 18-page Reply [DE 89] on March 10, 2017. The Reply did not comply with Local Rule 7.1, which requires all reply briefs to be no more than ten pages in length and filed within seven days of a response. Garcia's Reply was not considered.

2 HSI agents obtained two search warrants pertaining to Garcia—one for Garcia's Instagram account [DE 35-3] obtained in September 2016, and another for the target residence obtained in October 2016. [DE 35-4].

3 In his Objections, Garcia argues that Judge Turnoff abused his discretion by holding the hearing before his counsel had time to review aerial surveillance footage provided by the Government and discuss the evidence with Garcia. However, the Government began producing discovery on November 17, 2016. [DE 14.] Garcia's counsel was permitted to view the aerial surveillance footage at a discovery conference on December 5, 2016. The Motion to Suppress was filed on December 26, 2016; and on January 5, 2017, Judge Turnoff set the hearing for January 23, 2017. Thus, it appears Garcia's counsel had several weeks to prepare for the hearing. Moreover, despite the fact that Garcia has been incarcerated on a separate offense since Decemeber 12, 2016, Garcia only raised the continuance issue in a conclusory motion on the Friday afternoon before the Monday, January 23, 2017 hearing.

4 Garcia also maintains that Magistrate Judge Turnoff wrongfully precluded any testimony as to the validity of the search warrants. However, as discussed above, Garcia agreed to the limit the scope of the hearing.

5 Although the affidavits provide no information about the informant's reliability, law enforcement is not required in every case to provide such information. An informant's veracity and reliability are "relevant considerations in the totality of the circumstances analysis that traditionally has guided probable cause determinations." *Illinois v. Gates*, 462 U.S. 213, 233 (1983). Given the totality of evidence in the affidavits, the reliability of the informant is not dispositive. Furthermore, the informant's activities were corroborated through video and audio recordings. *See Ortega*, 85 F.3d at 1525 ("[C]orroboration of the details of an informant's tip through independent police work adds significant value to the probable cause analysis.").

6 Garcia cites *Whiteley v. Warden, Wyo. St. Penitentiary*, 401 U.S. 560, 565 n.8 (1971) for the proposition that a court may not, on a motion to suppress, assess probable cause based on evidence not previously disclosed to the magistrate. However, Garcia does not specify any evidence disclosed at the hearing that was not within Agent Slaizas' knowledge at the time of the arrest. Moreover, this Court's assessment of probable cause above only considers information known to law enforcment at the time of the arrest.

7 Garcia claims to have made his second request in front of Agent Selent and Norellis Garcia. [Hr'g Tr. 85:8-19; 86:7-10.] Neither individual was called to testify. Garcia also claims that a "beared" agent was present when he made his third request. [Hr'g Tr. 81:9-16.] The bearded agent was present at the evidentiary hearing, but was not called to testify.

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2017 WL 1032266
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

UNITED STATES of America, Plaintiff,

v.

Harrison GARCIA, Defendant.

CASE NO. 16-20837-CR-SEITZ/TURNOFF

|

Signed 03/16/2017

Attorneys and Law Firms

Jonathan Kent Osborne, US Attorney's Office, Miami, FL, for Plaintiff.

Barbara Perez Munoz, Miami, FL, Michael David Becker, Fort Lauderdale, FL, Theodore George Mastos, Coral Gables, FL, for Defendant.

ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION

PATRICIA A. SEITZ, UNITED STATES DISTRICT JUDGE

*1 THIS MATTER is before the Court on a Report and Recommendation [DE 76] denying Defendant Garcia's Motion to Suppress. [DE 26.] Garcia has filed objections to the Report [DE 82], to which the Government has responded. [1] [DE 86.] The Court has conducted a *de novo* review of the record, including the objections, the response and the transcript of the Suppression Hearing, dated January 23, 2017. The Court finds the Report's factual findings to be reasonable and supported by the record, and its legal conclusions to be consistent with the law. The Motion is therefore denied.

BACKGROUND

Garcia is charged with five counts: conspiracy to possess with intent to distribute controlled substances, maintaining a drug-involved premises, possession with intent to distribute controlled substances, and two counts of possession of a firearm in furtherance of a drug-trafficking crime. [DE 10.] Garcia was stopped while driving and arrested without a warrant on October 18, 2016, at 5:50 PM. Upon his arrest, agents from Homeland Security Investigations (HSI) searched Garcia's vehicle and returned him to a dwelling located at 7751 SW 29th Street, Miami, Florida ("target residence"), as a search warrant of that residence was being executed. The search revealed various firearms, bags of marijuana and other narcotics, U.S. currency and drug paraphernalia. [DE 1 at 2-3.] After Garcia was advised of his *Miranda* rights at approximately 7:30 PM, he allegedly signed a *Miranda* Statement of Rights Waiver Form and admitted to selling narcotics. He also purportedly gave verbal and written consent for agents to search (1) a second residence, (2) a commercial storage unit, and (3) all of Garcia's cellular phones. These searches revealed additional evidence of narcotics distribution and firearms possession. [DE 1 at 3-4.]

Garcia filed a Motion to Suppress on December 26, 2016. He moved to suppress evidence obtained from two search warrants,[2] arguing that both warrant applications contained false statements and relied on an unreliable informant. He also moved to suppress evidence seized from his vehicle, arguing that agents lacked probable cause to stop and arrest him. In addition, Garcia moved to suppress his post-*Miranda* statements and all evidence seized pursuant to his consent to search. He claims (1) his three requests for an attorney were ignored, and (2) he never signed the waiver and consent to search forms.

On January 5, 2017, Magistrate Judge Turnoff scheduled an evidentiary hearing for January 23, 2017. On January 20, 2017, Garcia requested a continuance of the hearing so that his counsel could have additional time to prepare. [DE 45.] Judge Turnoff denied the continuance[3] and, after reviewing Garcia's Motion, limited the scope of the hearing to Garcia's alleged *Miranda* waiver and consent to search. [Hr'g Tr. 19:15-25; 20:1-2.] Both Garcia and the arresting officer, Agent Rimas Sliazas, testified at the hearing.

DISCUSSION

***2** The Report recommends denying Garcia's motion. With regards to the search warrants, the Report found the warrant applications to be valid, denied Garcia's request for a *Franks* hearing and confirmed that probable cause existed to issue both search warrants. As to the arrest, the Report found that HSI agents had probable cause to arrest Garcia and search his vehicle based on the warrant applications, including two controlled narcotics purchases and a trash pull; the search warrant returns; and the testimony of Agent Sliazas. As to the post-*Miranda* statements and searches, the Report found that Garcia properly signed and executed the waiver and consent to search forms.

A. The Search Warrants

Garcia objects to the finding of probable cause for the searches, arguing that he had no opportunity to challenge the search warrants at the suppression hearing. His objection ignores the fact that he exercised his right to challenge the search warrants when he filed his Motion to Suppress. While long on the law, the Motion fails to tie the law to any specific relevant facts. Where a motion to suppress fails to show that relief is warranted, the Court may exercise its discretion and decline to hold a hearing. *United States v. Cooper,* 203 F.3d 1279, 1285 (11th Cir. 2000). Judge Turnoff held a hearing, but at the outset of the hearing found the search warrants and supporting affidavits to be valid, [Hr'g Tr. 14:1-2; 15:23-25], and limited the scope of the hearing to other issues. [Hr'g Tr. 19:15-25; 20:1-2.] Garcia did not object, and in fact, tacitly agreed that the hearing should be focused on his alleged *Miranda* waiver and consent to search. [Hr'g Tr. 13-15.]

Moreover, Garcia fails in his Motion to point out a single false statement or material omission in the warrant applications. *See Franks v. Delaware,* 438 U.S. 154, 171 (1978) (requiring the defendant to make a preliminary showing that a material omission or false statement in the warrant application altered the probable cause showing). He merely makes conclusory allegations that the affidavits contain misrepresentations without specifying the facts being misrepresented or omitted. Nor does Garcia provide any evidence to show that the confidential informant's information regarding the purchases was unreliable. Thus, Garcia did not meet his threshold burden. Therefore, the warrant applications are valid and the *Franks* hearing was properly denied.

B. Garcia's Arrest and Vehicle Search

Garcia objects to the finding of probable cause for his arrest, arguing that agents lacked "first hand reliable knowledge" of illegal activity.[4] However, "first hand reliable knowledge" is not the standard for probable cause. Moreover, the record

reveals that agents had ample knowledge of suspected criminal activity to establish probable cause. Garcia previously pled guilty with adjudication withheld for two separate narcotics charges. [DE 35-3 at 7.] HSI agents had been observing Garcia's Instagram account—"muhammad_a_lean,"—since February 2016. [DE 35-3 at 6.] The account contained multiple photos of Garcia alongside bottles of promethazine with codeine, marijuana, firearms and U.S. currency. *Id.* at 6-7. Records provided by Instagram on October 12, 2016, revealed conversations between Garcia and others apparently negotiating the sale of narcotics. [DE 35-4 at 5.] In August and September 2016, agents conducted two audio- and video-recorded controlled purchases of narcotics from Garcia using a documented confidential informant.[5] [DE 35-3 at 6-8.] A trash pull at the target residence on October 12, 2016, retrieved empty bottles of promethazine with codeine and marijuana paraphernalia. [DE 35-4 at 6.] The record above meets the standard for probable cause.[6] *Ortega v. Christian,* 85 F.3d 1521, 1525 (11th Cir. 1996) (finding probable cause to arrest when the facts within an agent's knowledge, based on reasonably trustworthy information, would cause a reasonable belief that a crime has been committed). Given that probable cause existed to arrest Garcia for drug crimes, agents also had probable cause to search his vehicle. *See Thornton v. United States,* 541 U.S. 615, 632 (2004) (holding that officers have probable cause to search a vehicle when a suspect is removed from his vehicle and arrested for drug crimes).

C. Garcia's Request for Counsel

***3** Garcia claims in his Motion that he requested counsel three times prior to executing the waiver form—once upon his arrest, once while inside the target residence, and once after being advised of his *Miranda* rights. The Report did not make a finding on this claim. Instead, the Report found that Garcia voluntarily executed the waiver form. The Court reviews the claim *de novo.*

Once a suspect in custody asks to speak to an attorney, he may not be subjected to further interrogation until counsel is present, unless he intiates further conversations with the police. *Edwards v. Arizona,* 451 U.S. 477, 485-86 (1981). Garcia bears the burden to establish his request for counsel. *United States v. Armstrong,* 722 F.2d 681, 685 (11th Cir. 1984). Garcia testified that he requested an attorney three times: (1) as he was taken into custody [Hr'g Tr. 79:14-15]; (2) while inside the target residence following his arrest [Hr'g Tr. 85:8-19; 86:7-10]; and (3) as Agent Selent was reading the waiver form outside the target residence.[7] [Hr'g Tr. 87:8-13; 91:7-19.] Garcia maintains that the arresting agent, Agent Sliazas, was not present when his requests were made. Agent Sliazas on the other hand claims he was with Garcia from the time of his arrest, except when Garcia was inside the target residence. [Hr'g Tr. 55:4-5; 59:21-23.] According to Agent Sliazas, Garcia never requested an attorney in his presence, [Hr'g Tr. 32:11-13; 67:2-4, 19-21], and in fact, verbally indicated his intent to cooperate. [Hr'g Tr. 36:15-23.]

In light of the two conflicting accounts, Garcia has not satisfied his burden to establish a request for counsel. He offers no evidence aside from his own testimony, which Magistrate Judge Turnoff discredited in light of Garcia's on-the-record explanation his prior drug offenses, his previous *Miranda* waivers, and his access to the target residence. [DE 76 at 19-23.] After reviewing the hearing transcript, the Court finds Judge Turnoff's credibility assessment to be believable and applies the assessment here. *See United States v. Ramirez-Chilel,* 289 F.3d 744, 749 (11th Cir. 2002) (deferring to the magistrate judge's credibility determinations unless his understanding of the facts appears to be unbelievable). Moreover, Agent Sliazas' testimony is bolstered by the undisputed testimony as to Garcia's efforts to cooperate with agents by providing them access to the second residence and his cellular phones. Based on all the testimony, the Court finds that Garcia did not ask to speak to an attorney; thus his right to counsel was not violated.

D. Waiver and Consent

Garcia objects to the finding that he voluntarily waived his *Miranda* rights. First, he argues there are no video or audio recordings of him waiving his rights. However, the Government need only prove by a preponderance of the evidence that a suspect knowingly, intelligently and voluntarily waived his rights. *United States v. Chirinos,* 112 F.3d 1089, 1102 (11th Cir. 1997); *see*

also United States v. Goodman, 147 Fed.Appx. 96, 102 (11th Cir. 2005) ("There is no requirement that an interview be recorded, even if a video camera is available[.]").

1. Garcia's consent was voluntary.

***4** Garcia argues that his consent to search was the product of coercion by law enforcement. Specifically, he contends that he was surrounded by armed guards and that his consent was a "submission to apparent authority" rather than voluntary consent. The voluntariness of consent is a question of fact determined in light of the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227 (1973). Relevant factors include the use of coercive procedures, the extent of the person's cooperation, his awareness of the right to refuse consent, and his education and intelligence. *United States v. Purcell,* 236 F.3d 1274, 1281 (11th Cir. 2001).

Agent Sliazas testified, and Garcia does not dispute, that at the time the consent form was read, Garcia was not in handcuffs, he was outside the target residence and agents had holstered their weapons. [Hr'g Tr. 36:2-14.] Agent Sliazas also testified that he removed his body armor shortly after the arrest, [Hr'g Tr. 31:9-20], took steps to make sure that Garcia was not injured [Hr'g Tr. 28:10-24], and offered him food and water. [Hr'g Tr. 43:10-16.] Garcia was relaxed and did not appear to be under the influence of alcohol, and had a command of the English language. [Hr'g Tr. 38:3-19; 58:18-23.]

Garcia on the other hand testified that he had no intention to cooperate but "felt like [he] was against the wall." [Hr'g Tr. 92:2-3.] However, as noted above, Magistrate Judge Turnoff discredited Garcia's statements in light of his entire testimony. [DE 76 at 19-23.] The Court finds Judge Turnoff's assessment to be reasonable; and declines to accept Garcia's testimony in this regard. Based on Agent Sliazas' testimony, it appears Garcia's consent was voluntary.

2. Garcia's consent included the second apartment, the storage unit and his cellular phones.

Garcia further argues that the consent form does not sufficiently specify the property to be searched. The form listed the street address of the second residence without identifying an apartment number, an unidentified "storage location," and Garcia's cellular phones. When a defendant gives a general statement of consent, the scope of the permissible search "is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass." *United States v. Street,* 472 F.3d 1298, 1308 (11th Cir. 2006); *see also United States v. Milian-Rodriguez,* 759 F.2d 1558, 1564 (11th Cir. 1985) (noting that a defendant's additional description of property to be searched provides additional evidence of his consent). While the consent form does not list an apartment number for the second residence or an address for the storage unit, Agent Sliazas testified that Garcia provided these locations to law enforcement. In addition, Garcia provided law enforcement with the passwords necessary to access his cell phones. [Hr'g Tr. 46:1-25; 73:6-25; 74:1-12.] Given his assistance in locating the areas to be searched, it was reasonable for agents to believe that Garcia consented to those searches.

Therefore, it is

ORDERED THAT:

(1) Garcia's Objections to the Report and Recommendation [DE 82] are **OVERRULED.**

(2) The Report and Recommendation [DE 76] is **AFFIRMED AND ADOPTED.**

(3) Defendant Garcia's Motion to Suppress [DE-26] is **DENIED.**

DONE and ORDERED in Miami, Florida, this 16th day of March, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 1032266

Footnotes

1 Garcia filed an untimely 18-page Reply [DE 89] on March 10, 2017. The Reply does not comply with Local Rule 7.1, which requires all reply briefs to be no more than ten pages in length and filed within seven days of a response. Garcia's Reply will not be considered.

2 HSI agents obtained two search warrants pertaining to Garcia—one for Garcia's Instagram account [DE 35-3] obtained in September 2016, and another for the target residence obtained in October 2016. [DE 35-4].

3 In his Objections, Garcia argues that Judge Turnoff abused his discretion by holding the hearing before his counsel had time to review ariel surveillance footage provided by the Government and discuss the evidence with Garcia. However, the Government began producing discovery on November 17, 2016. [DE 14.] Garcia's counsel was permitted to view the ariel surveillance footage at a discovery conference on December 5, 2016. The Motion to Suppress was filed on December 26, 2016; and on January 5, 2017, Judge Turnoff set the hearing for January 23, 2017. Thus, it appears Garcia's counsel had several weeks to prepare for the hearing. Moreover, despite the fact that Garcia has been incarcerated on a separate offense since December 12, 2016, Garcia only raised the continuance issue in a conclusory motion on the Friday afternoon before the Monday, January 23, 2017 hearing.

4 Garcia also maintains that Magistrate Judge Turnoff wrongfully precluded any testimony as to the validity of the search warrants. However, as discussed above, Garcia agreed to the limit the scope of the hearing.

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6 Garcia cites *Whiteley v. Warden, Wyo. St. Penitentiary,* 401 U.S. 560, 565 n.8 (1971) for the proposition that a court may not, on a motion to suppress, assess probable cause based on evidence not previously disclosed to the magistrate. However, Garcia does not specify any evidence disclosed at the hearing that was not within Agent Slaizas' knowledge at the time of the arrest. Moreover, this Court's assessment of probable cause above only considers information known to law enforcment at the time of the arrest.

7 Garcia claims to have made his second request in front of Agent Selent and Norellis Garcia. [Hr'g Tr. 85:8-19; 86:7-10.] Neither individual was called to testify. Garcia also claims that a "beared" agent was present when he made his third request. [Hr'g Tr. 81:9-16.] The bearded agent was present at the evidentiary hearing, but was not called to testify.

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2017 WL 1194671
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

UNITED STATES of America,

v.

Harrison GARCIA, Defendant.

CASE NO: 16-20837-CR-SEITZ/TURNOFF

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Signed 02/09/2017

Attorneys and Law Firms

Jonathan Kent Osborne, U.S. Attorney's Office, Miami, FL, for United States of America.

Barbara Perez Munoz, Miami, FL, Michael David Becker, Fort Lauderdale, FL, Theodore George Mastos, Coral Gables, FL, for Defendant.

REPORT AND RECOMMENDATION

WILLIAM C. TURNOFF, UNITED STATES MAGISTRATE JUDGE

THIS CAUSE *1 is before the Court upon Defendant, Harrison Garcia's ("Defendant's") Motion to Suppress Evidence and Statements **(ECF No. 26)**, and an Order of Referral entered by the Honorable Patricia A. Seitz. **(ECF No. 34)**. A hearing on the Motion **(ECF No. 26)** took place before the undersigned on Monday, January 23, 2016. **(ECF No. 52)**. Upon review of the court file, the applicable law, hearing testimony, [1] argument from counsel, and being otherwise duly advised in the premises, the undersigned makes the following findings.

Background

Defendant was initially arrested and charged by way of a Complaint on October 18, 2016. **(ECF No. 1)**. He was later indicted, on November 2, 2016, and charged with conspiracy to possess with intent to distribute controlled substances, maintaining a drug-involved premises, possession with intent to distribute a controlled substance, and possession of a firearm in furtherance of a drug-trafficking crime. **(ECF No. 10)**. The drugs at issue are marijuana, promethazine with Codeine, a prescription cough syrup/controlled substance commonly known as "lean," and Alprazolam, the generic form of Xanax. Id.

This case stems from an investigation wherein Homeland Security Investigations ("HSI") identified an Instagram [2] account belonging to Defendant. **(ECF No. 1)**. In his Instagram posts, Defendant appears to be boasting about his life as a drug dealer. **(ECF No. 35, Ex. A)**. Specifically, the images depict him posing with bottles of promethazine with Codeine, other prescription drugs, marijuana, jewelry, firearms and large amounts of U.S. currency. Id. The investigation included surveillance and controlled narcotics purchases using a documented confidential informant ("CI"). **(ECF No. 35)**. These controlled transactions took place on August 26, 2016 and September 23, 2016. Id.

At issue here, among other things, are two search warrants. The first search warrant was obtained on September 26, 2016. **(ECF No. 35-3)**. This warrant, which relates to Defendant's Instagram account, "muhammad_a_lean," was presented before U.S. Magistrate Judge Patrick A. White under Case No: 16-3318-MJ-PAW. Id. It generated records, including direct messages, in which Defendant appeared to be negotiating the sale of lean and other controlled substances. Id. Upon receipt and review of the Instagram records, a second search warrant application was prepared and presented before U.S. Magistrate Judge Alicia Otazo-Reyes, on October 14, 2016, under Case No: 16-MJ-03411-AOR. **(ECF No. 35-4)**. This warrant relates to a dwelling located at 7751 S.W. 29th Street, Miami, Florida ("target premises"), a location where Defendant was believed to currently be, or previously have been, residing. Id.

Summary of Defendant's Arguments

*2 Defendant questions the validity of both warrants (ECF No. 26), and seeks to suppress statements and evidence obtained as the result of what he calls an illegal and unconstitutional stop, detention, search and seizure. Id. In light of this, Defendant requests a Franks[3] hearing. Id. Defendant also makes the following arguments: (1) The traffic stop was pretextural, and lacking in probable cause; (2) The search and seizure were illegal; (3) His Fifth and Sixth Amendment rights were violated; and therefore, any evidence seized should be suppressed. Id. The Government, on the other hand, argues that Defendant's arrest was based on probable cause, and thus, the subsequent vehicle search was appropriate. **(ECF No. 35)**. The Government further contends that Defendant waived Miranda and consented in writing to the search, seizure and forfeiture of his property. Id.

At the hearing, defense counsel conceded that the real issues are whether Defendant effectively communicated a request for an attorney, and whether he voluntarily executed the waiver and consent forms. Hr'g. Mot. Suppress Tr. 13:3-24 Jan .23, 2017.[4] Specifically, counsel stated, "there are little issues here and there, but the most important thing is whether Harrison Garcia effectively communicated a request for a lawyer." Id. The undersigned agrees. Accordingly, the lion's share of this Report and Recommendation shall focus on same. The collateral, or smaller issues, shall be briefly discussed in order to make a full record.

Search Warrants

Instagram Account "muhammad_a_lean."

As noted above, on September 27, 2016, HSI agents presented a search warrant application before U.S. Magistrate Judge Patrick A. White. **(ECF No. 35-3)**. In support of the application, HSI Special Agent Kevin Selent ("Agent Selent"), the affiant, states that agents began monitoring several Instagram accounts by creating their own accounts and submitting "friend requests" to the target accounts. Id. The targets consented to agents viewing their accounts by "accepting" the agent-associated accounts and "adding" them as friends. Id. Once on Defendant's Instagram page, i.e., "Muhammad_a_lean," agents observed photographs of firearms and bottles of promethazine with codeine. Id. The page also contained images of marijuana in quantities consistent with the distribution of narcotics. Id. Agent Selent's affidavit in support of the search warrant provides the following detailed description of the images.

(a) On or about September 14, 2015, a photograph of GARCIA and another male. GARCIA is holding two suspected firearms, while the unknown male is holding another suspected firearm.

(b) On or about January 11, 2016, a photograph of GARCIA with a bottle of promethazine with codeine syrup next to him.

(c) On or about January 26, 2016, a photograph of GARCIA standing at a counter top with several suspected bottles of promethazine with codeine syrup next to him.

(d) On or about March 28, 2016, a photograph of suspected "moonrocks," a type of marijuana, with the caption "New flavor alert."

(e) On or about May 20, 2016, a photograph of GARCIA holding a large quantity of U.S. Currency with a bottle of promethazine with codeine syrup on the table.

(f) On or about August 16, 2016, a photograph of GARCIA holding a suspected firearm with two other suspected firearms on the sofa nearby.

(ECF No. 35-3).

Sometime thereafter, agents served Instagram with a preservation request, asking that it preserve all posts, photos, and videos posted to the "muhammad_a_lean" account. Id. Instagram complied. Id. The investigation further revealed that Defendant had two prior narcotics charges. Id. Specifically, on June 6, 2013, he pled guilty to possession with intent to distribute cocaine, a 2nd degree felony, possession with intent to distribute cannabis, a 3rd degree felony, and possession with intent to distribute a controlled substance, a 2nd degree felony. A few weeks later, on June 21, 2013, he pled guilty to possession of a controlled substance, a 3rd degree felony. **(ECF No. 35-3).**

***3** According to the affidavit, law enforcement confirmed through multiple sources of information, that Defendant is a "major distributor of promethazine with codeine, marijuana, and other controlled substances, in Miami-Dade County." Id. These sources also confirmed that Defendant's narcotics customers direct message [5] him through his "muhammad_a_lean" Instagram account, in order to make purchases. Id. In this connection, the affidavit recounts the two controlled narcotics purchases noted *supra*.Id. Both transactions were audio and videotaped. Id. In both instances, agents observed Defendant leaving his residence and driving to the predetermined location. Id. During the August 26th transaction, Defendant sold the CI two pints of promethazine with codeine, 250 grams of marijuana, and 7 grams of moon rocks. Id. On September 23rd, Defendant sold the CI two pints of promethazine with codeine. Id. Following the controlled purchases, on September 26, 2016, agents continued reviewing Defendant's Instagram page. Id. Again, they observed photographs depicting Defendant with promethazine with codeine, marijuana, firearms and large amounts of U.S. currency. Id. In the affidavit, Agent Selent further avers that a Florida Department of Revenue 'wage and earnings check' revealed that Defendant has not declared income since 2011. Id.

Based upon Agent Selent's affidavit, and the exhibits attached thereto, Judge White found that there was probable cause and issued the search warrant for the "muhammad_a_lean" Instagram account. **(ECF No. 35-3).**

Target Premises

As noted *supra*, on October 14, 2016, HSI agents presented a search warrant application before U.S. Magistrate Judge Alicia M. Otazo-Reyes. **(ECF No. 35-4).** The application relates to the target premises, i.e., 7751 S.W. 29th Street in Miami, which was known to be associated with Defendant. Id. In support of the application, HSI Task Force Agent Roberto Fernandez ("Agent Fernandez") submitted an affidavit. Id. In the affidavit, he states that HSI investigations identified Defendant as an importer and distributer of methylone/ethyolone (commonly known as "molly"), as well as lean, cocaine and marijuana. Id. 'Agent Fernandez' affidavit describes the same photographs used in the Instagram search warrant application, and also discusses the August 26th controlled narcotics purchase, and the negotiations associated therewith. Id. Similarly, his affidavit also lists Garcia's prior criminal records and lack of reported income since 2011. Id.

According to the affidavit, law enforcement determined that Defendant was residing at the target premises sometime in August 2016. Id. During the course of surveillance, agents observed Defendant, and several of his known vehicles, at the residence on multiple occasions. Id. Utilizing several real estate websites, agents conducted an "open-source media search" of the target premises. This allowed them to view the interior and exterior of the residence which, in turn, enabled them to connect the Instagram images with same. Id. For example, on October 4, 2016, agents observed a photo on Defendant's Instagram page that depicted him standing in the enclosed driveway of the target premises, leaning on a Porsche Panamera, and posing with large amounts of U.S. currency. Id.

The affidavit further indicates that agents viewed Defendant's Snapchat[6] account, i.e., "harry3o5." Id. On Snapchat, they viewed a video titled Actavis.[7] In the video, Defendant is "holding a 20-ounce bottle of Sprite with a white opaque liquid and purple liquid." **(ECF No. 35-4)**. The video also depicts the interior of a residence with a distinct wooden framed door and horizontal blinds. Id. at ¶ 12. A comparison of the real estate website images, with those in the Snapchat video confirmed that the wooden door depicted in same is located inside the target premises. Id. Lastly, the agent describes a trash pull outside of the target premises on October 12, 2016. Id. The pertinent part of the affidavit states,

> ***4** ... at approximately 8:20 P.M., law enforcement observed a green trash bin that had been placed on the publicly accessible swale for garbage collection in front of the TARGET LOCATION. Agents retrieved the contents of the trash bin and found inside two (2) empty 16-ounce bottles of "Hi-Tech" brand promethazine with codeine (street value of approximately $1,000 per bottle), one (1) empty 16-ounce bottle of "Qualitest" promethazine with codeine (street value of approximately $750 per bottle), and four (4) empty cigar packages with the tobacco contents inside (commonly used to re-roll marijuana cigarettes/joints).

Id. at ¶ 13.

Based upon 'Fernandez' affidavit, and the exhibits attached thereto, Judge Otazo-Reyes found probable cause and issued the search warrant for the target premises. **(ECF No. 35-4)**.

Validity of the Search Warrants

Here, Defendant argues that both affidavits lacked the requisite probable cause. Among other things, Defendant argues that much of the information contained therein originated from unreliable and untrustworthy CIs who remain undisclosed. In other words, Defendant argues that agents should have provided details as to the basis of the CIs' knowledge "so that the issuing magistrate would have competent and complete information."[8] **(ECF No. 26)**. Because the affidavits lacked this information, Defendant contends that the resulting search warrants are invalid.

As a general matter, affidavits submitted in support of a search warrant application are presumed valid. Franks v. Delaware, 438 U.S. 154, 171 (1978). In order to overcome that presumption, there must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. Id. In other words, the movant must specify the portion of the affidavit that is claimed to be false, and provide supporting affidavits and/or sworn witnesses statements. Id. Allegations of negligence, without more, are insufficient. Id. In sum, the defendant must make a substantial preliminary showing that the affidavit contains an intentional or reckless falsehood. If this burden is met, the court must hold a Franks hearing.[9] Defendant herein has requested just that. The Government opposes the request and argues, *inter alia*, that

Defendant has failed to provide any support for his allegations. This Court agrees. Consistent with the reasons stated herein, the undersigned finds that Defendant falls short of his preliminary burden. Accordingly, a Franks hearing is not warranted.

In order to establish probable cause, a search warrant affidavit must contain facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises sought to be searched. United States v. Womack, No. 05-15218, 2007 WL 13836, at *1 (11th Cir. Jan. 3, 2007)(quoting United States v. Martin, 297 F.3d 1308, 1314 (11th Cir. 2002)). As correctly noted by the Government, the affidavit should establish a connection between the defendant, the premises to be searched, and any criminal activity. United States v. Martin, 297 F.3d 1308, 1314 (11th Cir. 2002). Applying the law to the facts of this case, and having carefully considered the above noted affidavits, the undersigned finds that both search warrants are valid.

Defendant's Arrest

*5 At the hearing, Agent Sliazas testified that he was involved in the above investigation, including the review of Defendant's Instagram page, the search warrants, and the controlled narcotics purchases. Hr'g Tr. 22:8-25; 23:23-25. He also participated in Defendant's arrest on October 18, 2017. Hr'g Tr. 24:18-25. In preparation for the arrest operation, and in light of what was observed on social media, i.e., multiple weapons, including an FN pistol, Glock firearms, an UZI and an AK-47, the decision was made to have several agents, [10] including a special response ("SRT") or SWAT team, on the scene. This was obviously done for the safety of law enforcement, the public, and that of Defendant. Hr'g Tr. 23:1-19;25:12-25. In furtherance of this goal, as well as the preservation of evidence, agents planned to apprehend Defendant once he was away from the residence. Id. Accordingly, they waited for him to leave the premises, in order to effect the arrest. Hr'g Tr. 27:3-15.

Agent Sliazas further testified that he personally removed Defendant from his vehicle. Hr'g Tr. 27:16-19. At the time, Defendant was accompanied by three male passengers. Id. Defendant's hands were up when the agent approached. Hr'g Tr. 27:21-25. The agent grabbed Defendant, put him on the ground, away from the vehicle, and placed him in handcuffs. Id. He stayed with Defendant until the other agents completed their assigned tasks. Id. Sometime thereafter, he introduced himself and made sure that Defendant was not injured. Hr'g Tr. 28:10-24. Once Defendant was secured, Agent Sliazas reholstered his weapon, tried to establish a rapport, and reassured him that "everything was going to be fine." Hr'g Tr. 31:17-19; 42:12-15. In order to make Defendant feel comfortable, agents later offered him food, cigarettes and water. Hr'g Tr. 43:10-20. The agent testified that in these circumstances, it is his practice to start the conversation "as humble as possible." Id. Along these same lines, he stated that agents did not threaten Defendant in any way. Hr'g Tr. 42:3-11.

At some point, he asked Defendant to provide him with keys to the residence, so that the SRT could just unlock the gate and the front door, as opposed to destroying the house to gain entry. Hr'g Tr. 29:3-16. In response, Defendant expressed concerns for his dogs, "Moonrock" and "Blu Ivy," [11] both of which were at the residence. Id. For everyone's safety, the agent asked Defendant for the location of the dogs, as well as the names of any individuals in the residence. Hr'g Tr. 29:17-25. According to Agent Sliazas, Defendant provided the keys, and the SRT entered the residence. Id. There was no attempt to interview Defendant at that time. Hr'g Tr. 30:10-15. He testified that agents waited until after the execution of the search warrant, and the securing of evidence, [12] before transporting Defendant back to the target premises. Hr'g Tr. 30:10-25. Once there, his handcuffs were removed, and both Agents Selent and Sliazas advised him of his Miranda rights. Hr'g Tr. 31:2-8.

When, as here, the constitutional validity of an arrest is challenged, it is the function of the court to determine whether the facts available to the arresting officers at the moment of the arrest support a finding of probable cause. United States v. Allison, 953 F.2d 1349-1350 (11th Cir. 1992) (citing Beck v. Ohio, 379 U.S. 89 (1964)). A warrantless arrest is appropriate if, at the time,

law enforcement possessed probable cause to effect the arrest. Allison 953 F.2d at 1349-50. Probable cause does not require an *actual* showing of criminal activity. Instead, it requires only a *probability* or substantial chance of such activity. Id. at 241. In other words, Probable cause exists where the facts and circumstances within an officer's knowledge, and of which he had reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in the belief that an offense has been, or is being, committed by the person to be arrested. Allison, 953 F.2d at 1350 (citing United States v. Waksal, 709 F.2d 653, 658, n. 8 (11th Cir. 1983)).

***6** In Allison, Drug Enforcement Administration ("DEA") agents were conducting an undercover operation at AWC Chemical Company ("AWC") in Eight Mile, Alabama. Id. at 1347. Agents were specifically investigating orders for chemicals used to manufacture phenylacetone ("P2P"), an amphetamine. Id. The orders in question were placed by Raymond Allison. Id. at 1348,1350. Allison used a fake name and arrived to pick up the chemicals in a rented vehicle with Texas license plates. Id. He paid with a money order, and expressed an interest in making additional purchases without the required paper work. Id. at 1351. While there, he voiced concerns about surveillance, telling undercover agents that he only chose AWC because he heard that they were not on law enforcement's radar. Id. at 1348. After the purchase, agents followed Allison and he was arrested. Id. A search of his vehicle revealed syringes, a spoon and methamphetamine residue. Id. Under these circumstances, the Eleventh Circuit upheld the warrantless arrest and noted that, "when considered together, [the facts] were sufficient to form a reasonable belief that Allison was conspiring to manufacture a controlled substance." Id. at 1351.

Here, as noted by Agent Sliazas, Defendant's car was stopped and he was arrested following the investigation detailed above. At the time, agents had, among other information, the search warrant returns, the trash pull, and the controlled narcotics purchases. Looking at the totality of the circumstances, it is fair to say that there was more than a probability that Defendant was engaged in criminal activity. Accordingly, upon careful consideration of the search warrant applications, the affidavits in support, the testimony of Agent Sliazas, and the law in this area, the undersigned finds that agents had probable cause to arrest Defendant on the day in question.

Vehicle Search Incident to Arrest

Having found that the arrest of Defendant was lawful, the undersigned shall now turn to the vehicle search following his arrest. As indicated above, Defendant argues that he and the occupants of the vehicle were forcibly removed by approximately ten to twenty fully armed agents. **(ECF No. 26, 56)**. Specifically, Defendant testified that agents broke the glass on the front driver and passenger sides with riffles and took him out—never giving him a chance to exit on his own. Hr'g Tr. 78:13-25. According to Defendant, he was then thrust onto the ground and handcuffed. Id. In his view, he had no possibility of access to the vehicle during the search. Id. Therefore, he concludes that the search was illegal.

Circumstances unique to the vehicle context justify a search incident to a lawful arrest. Arizona v. Gant, 556 U.S. 332, 343 (2009)(citing Thornton v. United States, 541 U.S. 615, 632 (2004)). In Gant, the Supreme Court explained that the following instances permit officers to search a vehicle incident to arrest: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or (2) when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. Gant, 556 U.S. at 343 (quoting Thornton v. United States, 541 U.S. 615, 632, 124 S.Ct. 2127, 2137, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring in the judgment)). There, the Court noted that where an occupant is arrested for a drug offense the 'offense of arrest' itself supplies the basis for searching the passenger compartment and any containers therein. See id. at 344.

Further, as explained by the Eleventh Circuit, the automobile exception authorizes a search of a vehicle if the vehicle is readily mobile, and officers have probable cause for the search. United States v. Alston, 598 Fed. Appx. 730, 734 (11th Cir. 2015), cert. denied, 136 S. Ct. 560 (2015)(citing United States v. Lindsey, 482 F.3d 1285, 1293 (11th Cir. 2007)). The mobility requirement requires only that the car be operational. Id. In Alston, the Court explained that because probable cause existed to search the vehicle for evidence of drug-trafficking activity, officers were permitted to search the areas where the two guns were found—the glove compartment and the area under the driver's seat. Alston, 598 Fed. Appx. at 734; see also, United States v. Ross, 456 U.S. 798, 825 (1982). Here, a search of the vehicle revealed, *inter alia*, a backpack [13] with a loaded firearm and drugs.

*7 Applying the law to the facts of this case, and again, taking into consideration the search warrant applications, the affidavits in support, and the testimony of Agent Sliazas, the undersigned finds that the search of the Chevy Suburban, incident to Defendant's arrest was proper.

Waiver of Miranda and Consent Search

It is well established that Miranda warnings should precede any custodial interrogation. See Miranda v. Arizona, 384 U.S. 436, 444 (1966); see also United States v. Brown, 441 F.3d 1330, 1347 (11th Cir. 2006) (a defendant is deemed to be in custody when there is a formal arrest and/or a restraint of movement comparable to same). A party can waive these rights if the waiver is voluntarily, knowingly, and intelligently given. Moran v. Burbine, 475 U.S. 412 (1986)(citing Miranda, 384 U.S. at 444, 475). In making this determination, Courts rely on a two-part test. Id.

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Id. (citing Fare v. Michael C., 442 U.S. 707, 725(1979)). Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned, and the consequences of the decision to abandon it. Id. In this connection, the Court may consider the defendant's education, age, intelligence, the length of detention, the prolonged nature of detention and the defendant's health. United States v. Bernal-Benitez, 594 F. 3d 1303, 1319 (11th Cir. 2010). In sum, a court may conclude that the Miranda rights were waived only if "the totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension Id. at 1318.

Here, Defendant flat out denies ever having waived his rights. He testified that he requested a lawyer, at least three times, and was denied. Hr'g Tr. 79:1-25; 80:1-25; 81:1-25. Agent Sliazas, on the other hand, testified that Defendant never asked for an attorney in his presence. Hr'g Tr. 32: 6-13. Instead, it is the agent's testimony that Defendant knowingly waived his Miranda rights, executed a consent form, and voluntarily spoke with law enforcement. Id. Defendant admits that the contents of the forms were read to him, and he concedes that he understood them. Hr'g Tr. 87:3-7. However, he denies ever having seen the forms (prior to discovery) or executing them. Hr'g Tr. 86:23-25; 87:1-2. Along these same lines, he denies that any of the writing or signatures on the documents belong to him. Hr'g Tr. 89:1-24. He also testified claims that Agent Sliazas was not present when the forms were presented, read and explained to him. Hr'g Tr. 87:15-20. Instead, he claims that it was Agent Selent who read him his rights. Hr'g Tr. 88:1-7. The relevant waiver/consent forms and related testimony shall be discussed below.

Waiver

The waiver form at issue is comprised of two sections. They are titled "STATEMENT OF RIGHTS" and "WAIVER." **(ECF No. 56-1)**. The 'rights' section channels the well known Miranda language, and lists, among others, the right to remain silent, and the right to consult with an attorney. **(ECF No. 56)**. The 'waiver' section states, "I have had the above statement of my rights

read and explained to me and I fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or immunity." Id.

***8** It is Agent Sliazas' testimony that he read and explained each right listed on the form to Defendant, in English. Hr'g Tr. 35: 5-20. At no time did Defendant appear to be under the influence of alcohol or narcotics. Hr'g Tr. 38:3-19. Further, at no time during the dialogue did Defendant communicate a lack of understanding of either the forms, or the conversation. Id. According to the agent, the execution of the forms took place outside of the target residence next to Agent Selent's vehicle. Hr'g Tr. 36:1-8. By that time, Defendant was uncuffed and the agents' firearms were either holstered or slung in a safe position. Id.

Agent Sliazas testified that he is "one hundred percent" certain that Defendant never asked for a lawyer in his presence. Hr'g Tr. 67:4-21. Instead, Defendant expressed an interest in speaking to the agents, and executed the forms in front of him. Hr'g Tr. 33:10-16; 36:15-23; 37:1-6. In fact, during the hearing, Agent Sliazas specifically stated, "that is definitely his signature ... I saw him sign it." Hr'g Tr. 37:4-25. After he executed the form(s), and upon questioning, Defendant made inculpatory statements as to his criminal activity and his role in the crimes described above. Hr'g Tr. 39:1-3.

Consent Form

In the same fashion, Defendant purportedly executed another HSI form titled CONSENT TO SEARCH. This form states, "I Harrison Garcia [14] have been informed by [ICE] Special Agent[s] Kevin Selent & Rim Sliazas of my right to refuse to a search of my property." **(ECF No. 56-2).** The form also contains the following acknowledgment,

> I hereby voluntarily and intentionally consent to allow ICE to search my property. My consent is freely given and not the result of any promises, threats, coercion, or other intimidation. "**I have read the above statement and understand my rights.**"

Id. (emphasis in original).

Again, Agent Sliazas testified that he personally presented the form to Defendant, and Defendant executed same in his presence. [15] Hr'g Tr. 39:3-25; 41:7-19. The document, dated October 18, 2016 at 9:50 p.m., depicts Defendant's signature, as witnessed by both agents. Id. Again, Agent Sliazas testified that at no point did Defendant express confusion or a lack of understanding as to these forms. Hr'g Tr. 43:17-23. Further, he never heard Defendant ask that the search be stopped, or indicate that the agents had exceeded the scope of his consent. Id.

It bears noting that this form not only lists the target premises, but also two additional locations, an apartment on Kendall drive, and a separate storage unit. Id. The agent testified that through their investigation, they "had some idea" that the Kendall apartment existed and was linked to Defendant. However, they did not know the exact address and had not obtained a search warrant for same. Id. According to Agent Sliazas, it was actually Defendant that provided them with the address and the keys. Hr'g Tr. 46:1-13. Agents likewise had no knowledge of the location of Defendant's storage unit. Again, the agent testified that it was Defendant that provided them with the address and rode with them to the location. Hr'g Tr. 46:13-26; 73:23-25; 74:1-2. Along these same lines, Defendant also provided agents with the passwords for his cellphones. Hr'g Tr. 74:1-12.

As noted above, Agent Sliazas provided detailed testimony as to the manner in which he advised Defendant of his rights. Throughout his testimony, he consistently stated that he was with Defendant during most of the relevant time period. Again, he testified that he personally removed Defendant from the vehicle and stayed with him until the other agents finished their assigned tasks. Hr'g Tr. 27:16-25. At first, he was with Defendant at the initial location of the arrest. Hr'g Tr. 54:13-23. Later, he was with Defendant outside of the target premises. In fact, he testified that he had nothing to do with the entry into the target premises because, "[he] was with Defendant [outside of the residence] the whole time." Hr'g Tr. 57:14-17. Indeed, it was outside of that residence, next to Agent Selent's vehicle, that Defendant Agent Sliazas claims to have advised Defendant of his rights.

Hr'g Tr. 35:5-25; 36:15-23. Again, when asked how he knew that was Defendant's signature on the forms, the agent simply responded, "I saw him sign it." Hr'g Tr. 37:1-25.

*9 When asked, in Court, if he was implying that the HSI agents fabricated the consent forms, Defendant responded as follows.

> Q. Is it your view, your opinion that the agents from Homeland Security forged Government's Exhibit 1 and Government's Exhibit 2?
>
> A. I mean, I really don't have no view on it like that, but, I mean, I wouldn't suppose—I wouldn't say that they did that, but that's not my signature and that's not my handwriting —
>
> Q. And you never saw these forms?
>
> A. I wouldn't consent to that. No sir.

Hr'g. Tr. 114:1-25.

Defendant insists that he immediately requested to speak with his attorney, [16] even while the keys to his vehicle were still in the ignition. Hr'g Tr. 84:3-10. However, he could not specifically identify the agent to whom he made the request. He claims that Agent Sliazas, the testifying agent, was not present at the time, but that Agent Selent was. Hr'g Tr. 78:14-18; 81:1-8; 86:7-13. At the hearing, Defendant pointed to an agent in the back of the courtroom, and identified him as being present "in the car the third time he asked for [his] lawyer." Hr'g Tr. 81:9-14. It is Defendant's testimony that his requests were ignored, and that Agent Selent specifically told him that he did not have the right to an attorney at that time. Hr'g Tr. 88:10-16.

He testified that he never intended to cooperate, and that he never voluntarily provided the keys to agents. Hr'g Tr. 84:9-14; 91:21-22. As he recalls it, "[the agent] told him that if [he] didn't give [them] the keys [they] [were] going to kill both of [his] dogs." Hr'g Tr. 83:15-24. During this time, he claims that he was separated from the others, and was told he was facing 20 years in prison. Hr'g Tr. 91:11-14. He described feeling "against the wall," and without many options. Hr'g Tr. 92:2-6. He concedes that he was taken to the second location, i.e., the apartment building on Kendall Drive, but claims that he remained in the car. Hr'g Tr. 93:13-16. He likewise denies having consented to the search of the apartment. [17] Hr'g Tr. 93:1-24.

In light of Defendant's position, the Court is forced to make a credibility assessment. Here, Defendant conceded that the Instagram account in question was his and that the images portray, among other things, him holding weapons and bottles of promethazine with codeine. [18] Hr'g Tr. 96:1-25. He explained that the photos with drugs, guns and money were meant to make him look like a big shot, and boost his career in the rap music industry. Hr'g Tr. 124:1-20. In this connection, he claims to have worked for, and been paid by, high profile rappers such as Lil Wayne, Chris Brown, and Future. Hr'g Tr. 124:21-25.

*10 When questioned about the large amounts of currency in the photos, he attributed it to nothing more than boasting on social media. Specifically, he testified,

> There [would] be occasions where I would go to the bank and withdraw money and just put it on, just flex it, like, you know. It was kind of stupid [on] my behalf to do that, now that I look back at it, but you know, at that point it made me feel like, you know, I was in a music video, so ...

Hr'g Tr. 124:9-14.

In other words, Defendant suggests that the currency he was flashing was earned by legitimate means. Interestingly, however, as indicated above, the investigation by agents revealed that he has not declared income since 2011. Equally interesting is his response to questioning about whether he was ever involved in drug trafficking.

Q: And prior to October 18th, were you also involved in drug trafficking.

A. No, sir.

Q. Not at any point?

A. No, sir.

Hr'g Tr. 94:4-8.

Q. And if I have videos of you exchanging drugs for money, how would you explain that?

A. I don't know.

Hr'g Tr. 94:16-20.

Q. Sir, how would you explain it?

A. I can't explain it.

Q. But you for sure were not involved in drug trafficking?

A. I wasn't.

Q. That's your testimony under oath to this honorable court?

A. I was never drug trafficking.

Q. Drug seller? How about that, is that a better phrase?

Hr'g Tr. 95:1-25.
Defendant provided no response, even after the following questioning by the Court.

THE COURT: You have to answer the question. Were you ever a drug seller?

MR. OSBORNE: I'll move on, Judge.

THE COURT: Was there an answer to that, for the record?

MR. OSBORNE: There was not.

THE COURT: There was no answer. Okay.

Id.

Upon further questioning, and after being confronted with state court conviction documents, Defendant admitted that he had a previous conviction/guilty plea for possession of a controlled substance. Same resulted in a withholding of adjudication. Hr'g Tr. 109:1-25. During the colloquy, Defendant testified as follows.

Q. And, Mr. Garcia, so you testified that you would not consider yourself to be a drug seller or a drug dealer, but haven't you been previously convicted of a narcotics offense?

A. What narcotics offense?

Q. Any narcotics offense. Have you ever been convicted os a narcotic offense?

A. I got charged with possession with intent to sell before. Marijuana.

Q. Okay. And how did you plead to those charges?

A. With a withhold.

Q. How did you plead? Guilty or not guilty?

A. I took a withhold, whatever that's supposed to mean. Withholds adjudication.

Q. So, if I was to show the Court a judgment that showed that you plead guilty, would you take the position that the position that document was forged?

A. Is a withhold [of] adjudication a plead of guilty?

Hr'g Tr. 107:19-25; 108:1-25.

Thereafter, defense counsel stipulated that the referenced documents related to Defendant's 2013 state court drug cases. Hr'g Tr. 109:5-15. Defendant then testified that he did recall being arrested, at home, on March 20, 2013 for allegedly selling drugs. Hr'g Tr. 110:8-15. Defendant initially denied, that on that occasion, he admitted to law enforcement that drugs and a gun found on the property belonged to him. Id. Later, when questioned as to whether he had waived his Miranda rights on that occasion, Defendant responded as follows.

***11** Q. Do you remember being advised of your Miranda rights in that case?

A. Yeah, I believe so.

Q. And do you remember waiving them and agreeing to speak with the police?

A. I never spoke with the police but I did waive my rights that day.

Hr'g Tr. 110:20-25.

Q. So when the officer in that record says that you waived Miranda and confessed that the property, the drugs and the gun belonged to you, that officer was lying?

A. No, sir, he was not lying. The reason I did that was because they were going to take my girlfriend and the kids to jail, so, I just did what I had to do there to not get them in trouble.

Q. So a moment ago you said that you were not—you didn't speak to the police. Now you're correcting that to stay that you—

A. I ain't speak to the police in the sense that, I thought you meant like a confession or something like that. What I'm saying was that I did waive my Miranda rights [that day] ..., but I learned from my experience.

Hr'g Tr. 111:1-16.

With respect to the instant case, Defendant also testified that the target premises was not his residence. However, upon further questioning, he admitted that he "had access to" certain rooms in that house. Hr'g Tr. 129:4-9. Specifically, while referring to Gov. Ex. 5, he stated,

> No, it wasn't my room, but I had access to that room. That was where the weed was at, but from what I recall, that box and stuff like that, it wasn't like that. I believe it was in the dresser. It wasn't out just like that, like how everything is just in plain view like that.

Id.

In this connection, he testified that he had just been in that room to "grab some personal weed," right before exiting the target premises on October 18th, the day of his arrest. Id.

With respect to the other location, the Kendall drive apartment, he stated "that's not specifically my bedroom, but I was staying there ... from time to time." Hr'g Tr. 133:1-16. He also identified some of his personal items, e.g., clothes depicted in a photo of said location. Id. He denied that a gun found at that location was his. Id. Yet, he conceded that he was pictured on Instagram holding that same gun on numerous occasions. Id.

Upon careful consideration of the testimony, the entire court file, including the search warrants and supporting affidavit, the undersigned finds Defendant's testimony not to be credible.

Having made that determination, the undersigned must determine whether there was a waiver, and if so, whether said waiver was voluntarily made rather than a product of intimidation, coercion, or deception. Fare v. Michael C., 442 U.S. 707, 725 (1979). In short, Defendant must have had a full awareness of both the nature of the right being abandoned, and the consequences of the decision to abandon it. Here, Defendant has an obvious command of the English language. He graduated high school and attended college. Hr'g Tr. 93: 23-25. He also testified that he works as a music producer, generating beats and instrumentals for top rap artists. Hr'g Tr. 94:2-4. Further, Defendant appears to be very familiar with the criminal justice system, its terminology, and the workings of same. As noted above, he has been the subject of prior searches and seizures by law enforcement, and has, on at least one occasion, permitted officers to conduct searches of his property. In light of his prior arrests and convictions, he clearly understands the consequences associated with the relinquishing of his rights.

Conclusion

***12** Here, nothing in this record suggests a prolonged interrogation, threats, intimidation or coercion. The record is likewise devoid of any suggestion that Defendant was injured, sleep deprived, drugged, inebriated or otherwise incapacitated. Given the totality of the circumstances, the representations made by the Government, and the testimony of the agent, the undersigned finds that Defendant's executed the waiver, consent and abandonment forms, and his subsequent statements were made

knowingly, intelligently and voluntarily, consistent with the evidence documented above. Accordingly, it is **RESPECTFULLY RECOMMENDED** that Defendant's Motion to Suppress **(ECF No. 26)** be **DENIED**.

In light of the pending trial date, the time for filing objections shall be expedited. **The parties shall have ten (10) days from service of this Report and Recommendation within which to serve and file written objections**, if any, with the Honorable Patricia A. Seitz, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. Loconte v. Dugger, 847 F.2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988); R.T.C. v. Hallmark Builder, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY RECOMMENDED in Chambers at Miami, Florida, this 9th day of February 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 1194671

Footnotes

1 Defendant testified at the hearing, as did Special Agent Rimas Sliazas ("Agent Sliazas"). Id.

2 Instagram is a free-access social-networking website. It allows users to create their own profile pages, which can include a short biography, a photo of themselves, and other information.

3 Pursuant to Franks v. Delaware, the Court must hold a hearing if Defendant makes a substantial preliminary showing that the affidavit supporting the warrant contains an intentional or reckless falsehood or omission. See Franks v. Delaware, 438 U.S. 154 (1978).

4 All references to the suppression hearing shall include page and line designations. The transcript can be found at **(ECF No. 59)**.

5 Direct messages to Instagram users are private, and cannot be viewed publically.

6 Snapchat is also a web-based image messaging application that can be accessed through mobile devices. The application allows users to instantly upload videos and post them online for viewing in a "snap."

7 Actavis is a pharmaceutical company that manufactures promethazine with codeine. **(ECF No. 35-4)**.

8 Although not relevant at the time of the application, it bears noting that Defendant's Request for Klyles, Giglio and Brady Information **(ECF No. 29)**, which requested information on the CIs used in the investigation, was recently denied by Judge Seitz. **(ECF No. 40)**. In the Order denying the request, the Court found, among other things, that "given [Defendant's] proclivity towards social media, disclosure may endanger the informants themselves or other ongoing investigations." Id.

9 If the requirements are met as to a certain of portion the materials, but there otherwise remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. Id. at 171-172.

10 The operation also included Customs and Border Protection ("CBP") agents, as well as a CBP helicopter conducting surveillance of the area. Hr'g Tr. 26:1-11.

11 The dogs appear to be named after a type of marijuana and, "Blu Ivy," the daughter of rapper Jay Z and, music artist, Beyonce.

12 The search of the target premises resulted in the recovery of a money counter, a digital scale, marijuana, and packaging materials. Hr'g Tr. 45:3-8.

13 When questioned as to whether he owned the backpack and its contents, and whether his driver's license was found in same, Defendant provided the following response, "I mean, we all had our stuff in there. We were all going to the studio and we had our stuff in there together." Hr'g Tr. 118:1-25.

14 The underlined text reflects the portions of the form that were handwritten. **(ECF No. 56-2).**

15 Both agents executed the form(s) as witnesses.

16 Defendant explained that his current counsel, Ms. Munoz, who has represented him on other matters, advised him to always request an attorney when confronted by law enforcement. He claims that he did exactly that in this instance. Hr'g Tr. 80:1-5.

17 The Government also produced a Notice of Abandonment and Assent to Forfeiture form executed by Defendant. **(ECF No. 56-3).** In the forms, Defendant purportedly agrees to abandon and forfeit among other things, two (2) Glock pistols, an AK-47, an UZI Pistol Pro 9mm weapon, $15,000 in U.S. currency, various gold and silver jewelry and a Rolex watch. Id.

18 He claims that he consumed the drug on a daily basis, drinking one bottle every two days for three years straight. Hr'g Tr. 122:12-25; 123:1-25. Perhaps, that explains his extensive knowledge of the street value of same. Specifically, upon questioning, he testified that a bottle can range between $600-1,000. Hr'g Tr.104:1-25; 105:1-4.

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