No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ORENTHA JAMES PEA — PETITIONER

VS.

UNITED STATES — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CASE NO. 19-cr-00294-01
VERSUS	JUDGE ELIZABETH E. FOOTE
ORENTHA JAMES PEA (01)	MAGISTRATE JUDGE HORNSBY

REPORT AND RECOMMENDATION

Introduction

Orentha James Pea ("Defendant") is charged with two counts: Felon in Possession of a Firearm and Possession of a Firearm After Having Been Convicted of a Misdemeanor Crime of Domestic Violence. The charges arose after Defendant's estranged wife, Termekia Montgomery, called police following an altercation with Defendant.

Before the court is Defendant's Motion to Suppress. Doc. 21. Defendant argues that the search of his wife's home was illegal because police failed to obtain a warrant or valid consent. For the reasons that follow, it is recommended that Defendant's motion be denied.

Factual Background

An evidentiary hearing was held on January 17, 2020. Three witnesses testified: Officer Richard Pollitt of the Shreveport police department, ATF Task Force Officer Toby Morrison, and Defendant. The evidence at the hearing established the following facts.[1]

[1] Defendant objected that the Government did not call Ms. Montgomery as a witness. However, hearsay is permitted at a hearing on a motion to suppress. United States v. Lee, 541 F.2d 1145 (5th Cir. 1976). Two police witnesses who spoke multiple time with Ms. Montgomery testified, and

Defendant and his wife, Ms. Montgomery, are married and have eight children together, ranging from 7 to 18 years of age. In May 2018, Defendant and Ms. Montgomery rented the residence at 1121 Running Brook, Shreveport, Louisiana. Gov. Ex. 1. Both signed the lease. In December 2018, the lease was amended to remove Defendant's name and signature. Gov. Ex. 2.

Defendant was consistently violent and abusive towards Ms. Montgomery. For example, in 2005 Defendant shot Ms. Montgomery in the back when she was pregnant, which resulted in Defendant's conviction for aggravated battery.

On January 13, 2019, the day before the search in question, Defendant was riding as a passenger in Ms. Montgomery's SUV with two of their children in the backseat. Defendant began arguing with Ms. Montgomery, and he pulled out a pistol, placed it to Ms. Montgomery's head, and threatened to shoot her. The children in the backseat begged him not to do so.

At some point during that night or early on the morning of January 14, 2019, Defendant entered Ms. Montgomery's residence without her permission. Even though Defendant was removed from the lease and was not welcome in the house, he would sometimes enter through the windows or unlocked doors.

At some point that morning, Defendant asked Ms. Montgomery to take him to a corner store. She dropped him off and, instead of waiting for him, she left the store and

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their testimony was generally consistent and reliable. It is understandable why she may not have wanted to testify. Furthermore, Defendant could have subpoenaed Ms. Montgomery if he believed her testimony was necessary to his standing argument or any other issue.

called 911. Ms. Montgomery believed that Defendant returned to her residence after he left the store. Because of that belief, she pulled into her driveway, but she waited in her SUV for police to arrive.

SPD Officers Pollitt and Medlin responded to Ms. Montgomery's call of assault and battery. When they approached the residence, Ms. Montgomery exited her SUV and spoke with Officer Pollitt. Ms. Montgomery appeared very frightened and upset. She reported that her husband had threatened to blow her head off the previous day. The officer noted that there were children in Ms. Montgomery's SUV.

Officer Pollitt and Officer Moore, who arrived separately, approached the garage door to the home and knocked. Defendant came to the door, and the officers asked him to step outside. During questioning, Defendant "played dumb" but did not deny any of the accusations. One of the officers detained Defendant and put him in a patrol car.

Ms. Montgomery told the officers that she believed Defendant's gun may be in the residence. Officer Pollitt asked Ms. Montgomery for consent to search the residence to look for the gun. Ms. Montgomery gave him verbal consent. The gun was found in a small closet that housed an air conditioner unit.

Pollitt returned to his unit to retrieve his camera and a Victim Notification Rights Form and returned to the residence to fill out the form. While doing so, Pollitt saw and heard Officer Moore present Ms. Montgomery with a written consent to search form. Officer Pollitt, who was just a few feet away, saw Officer Moore at the kitchen counter explaining the form to Ms. Montgomery. Pollitt also saw Ms. Montgomery sign the form. The form, however, has not been located since. Officer Moore now works in another state.

Law and Analysis

There are two legal issues before the court: (1) whether Defendant has standing to challenge the search of the residence, and (2) whether the Government proved that Ms. Montgomery consented to the search of her residence for the purpose of locating the handgun.

Standing

To claim the protection of the Fourth Amendment, a defendant must demonstrate "a legitimate expectation of privacy" in the place that was searched. Minnesota v. Carter, 525 U.S. 83, 119 S. Ct. 469, 472 (1998); United States v. Vega, 221 F.3d 789, 797–98 (5th Cir. 2000), abrogated on other grounds, as recognized in United States v. Aguirre, 664 F.3d 606, 611 n. 13 (5th Cir. 2011). To be legitimate, the expectation of privacy must be based "on a visit which represents a longstanding social custom that serves functions recognized as valuable by society." Vega, 221 F.3d at 798 (internal quotation marks omitted). For example, an overnight guest may claim the protection of the Fourth Amendment, but a visitor "merely legitimately on the premises" cannot. Carter, 119 S.Ct. at 474 (internal quotation marks omitted). In Carter, the Supreme Court concluded that two defendants who were invited into the home of another for the purpose of bagging cocaine had no legitimate expectation of privacy in light of "the purely commercial nature of the transaction engaged in [in the apartment], the relatively short period of time on the premises, and the lack of any previous connection between [the defendants] and the householder." Id; United States v. Rios-Davila, 530 Fed. Appx. 344 (5th Cir. 2013)

(invited visitor at residence did not have standing to challenge search that began when officers entered backyard without probable cause).

Defendant testified at the hearing in an attempt to establish his standing to object to the search. He testified that he was at his mother's house in Grand Cane, Louisiana on January 13, 2019. He stated that Ms. Montgomery called him and told him that she needed "wash money." Defendant admitted that Ms. Montgomery's request was for wash money and not for Defendant to spend the night at the residence.

Defendant also testified that he had previously told Ms. Montgomery that he "had someone else." According to Defendant, her response was: "If I can't have you, I'll kill you or have you in jail." Defendant concluded his testimony by stating, "Monday morning, I was in jail."

Defendant was removed from the lease a few months after it was signed. When Defendant did enter the home, he was not an invited guest and he often broke into the home. More to the point, Defendant was not an invited guest in the home on the day of the search. Accordingly, Defendant lacks standing to challenge the search that led to the discovery of the handgun.

Consent

Even if Defendant had standing to challenge the search of the home, Ms. Montgomery gave the police officers valid consent to search. "A search conducted pursuant to consent is excepted from the Fourth Amendment's . . . requirements." United States v. Solis, 299 F.3d 420, 436 (5th Cir. 2002). Where the government asserts that no search warrant was required because the officer obtained consent to search, the government

must prove by a preponderance of the evidence that consent was freely and voluntarily given. United States v. Tompkins, 130 F.3d 117, 121 (5th Cir. 1997). Whether "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Schneckloth v. Bustamonte, 93 S.Ct. 2041 (1973). In evaluating the voluntariness of consent, the Fifth Circuit looks to six factors: (1) the voluntariness of the person's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the person's cooperation with the police; (4) the person's awareness of his right to refuse consent; (5) the person's education and intelligence; and (6) the person's belief that no incriminating evidence will be found. United States v. Cavitt, 550 F.3d 430, 439 (5th Cir. 2008). No single factor is dispositive or controlling. Solis, 299 F.3d at 436.

The court finds that the police officers' testimony established the voluntariness of Ms. Montgomery's consent by a preponderance of the evidence. Ms. Montgomery was not in custody; in fact, she called the police because she believed Defendant was in her residence with a handgun. The officers used no coercive or improper tactics to obtain consent. Ms. Montgomery was very cooperative at all times. She suspected there was a handgun in the home, and she wanted police to find it and remove it—obviously for the safety of her and her children.

There was credible testimony that another officer presented a written consent to search form to Ms. Montgomery, that the document was explained to her, and she signed it. That form has never been found, but there was persuasive evidence that it was signed

and that Ms. Montgomery gave verbal consent. That evidence is sufficient to meet the Government's burden.

Accordingly,

It is recommended that Defendant's Motion to Suppress (Doc. 21) be denied.

Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED in Shreveport, Louisiana, this 29th day of January, 2020.

Mark L. Hornsby
U.S. Magistrate Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CRIMINAL NO. 19-294-01
VERSUS	JUDGE ELIZABETH E. FOOTE
ORENTHA JAMES PEA	MAGISTRATE JUDGE HORNSBY

MEMORANDUM RULING

Before the Court are the Defendant's objections to Magistrate Judge Hornsby's Report and Recommendation ("R&R") [Record Document 29]. Record Document 30. In his R&R, Judge Hornsby recommended that Orentha Pea's ("Pea") motion to suppress [Record Document 21] be denied. Pursuant to 28 U.S.C. § 636(b)(1), this Court is required to conduct a de novo review of the portions of the R&R to which objections were filed. The Court may then accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge. Even when the objections challenge credibility determinations, the district court is not required to re-hear the suppression hearing testimony, but rather may defer to the magistrate judge's credibility findings when they are supported by the record. United States v. Gibbs, 421 F.3d 352, 357 (5th Cir. 2005); see Louis v. Blackburn, 630 F.2d 1105, 1109 (5th Cir. 1980) ("One of the most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses."). Following a thorough review of the motion, the parties' briefing in

this matter, the R&R, and the objections thereto, the Court hereby **ADOPTS** the R&R with the following additional observations.[1]

In this case, Pea seeks to suppress a firearm discovered during a search of the residence of his estranged wife, Ms. Montgomery ("Montgomery"), and the principal dispute is whether Pea was an invited guest at the residence such that he had a reasonable expectation of privacy. If he was not an invited guest, then he lacks standing to challenge the search under the Fourth Amendment, and the inquiry ends there. On the other hand, if he was an invited guest, he would have standing to contest the search. If he has standing to challenge the search, the Government would have to prove that Montgomery's consent to search her residence for the gun was valid.

At a suppression hearing in this matter, two police officers testified. The first, Shreveport Police Officer Richard Pollitt ("Pollitt"), testified to Montgomery's verbal consent to search her house, the search he performed of Montgomery's house, how and where he found the firearm, and how he personally witnessed Montgomery sign the consent to search form after it was reviewed with her by another officer. There has been no challenge to his testimony on these critical points.

The second officer, ATF Task Force Officer Toby Morrison, was not present on the day of the search, but testified to his subsequent repeated discussions with Montgomery regarding Pea's access to her home and the events that led up to the search of her house. Morrison testified that Montgomery told him that in the past, she has repeatedly asked

[1] The Government did not file anything in response to the Defendant's timely objections to the R&R.

Pea to leave her house, but that he usually refuses. When he does leave, he always manages to get back inside even when the doors are locked.

Pea testified on his own behalf and stated that Montgomery had called him the night before the search and asked him for "wash money" because her washing machine was broken. He testified that Montgomery offered to come pick him up from either Mansfield or Grand Cane, where he was at the time of the phone call.[2] He told her that he could find a ride to her house. He arrived at her home that evening between 11:00 p.m. and 12:00 a.m. in order to fix the washing machine, although his testimony does not suggest that he ever actually did any of that work. Instead, he walked in through the garage, saw Montgomery sitting in the kitchen, "walked back outside and went out there and played, messed with my son, went in the house and went to sleep." Record Document 31, p. 46. Pea stated that Montgomery never asked him to leave.

1. Pea's legal status at the residence.

As clearly documented in the R&R, Judge Hornsby concluded that Pea was an uninvited guest in Montgomery's home. Pea objects to the Magistrate crediting the officers' testimony as to his status as a guest over his own testimony. The undersigned has thoroughly reviewed the testimony of all witnesses who testified at the suppression hearing. Following this review, the Court finds that the Magistrate Judge's credibility determinations are supported by the record.

[2] At one point, Pea stated he was in Mansfield when Montgomery called him, and later in his testimony, he stated he was in Grand Cane. Record Document 31, pp. 45, 47.

Pea concedes that his name was removed from the lease on Montgomery's residence the month prior to this incident, but insists he was an invited guest nonetheless, explaining that it is plausible that he and Montgomery had reconciled. He points to three facts in support of this contention: (1) that Montgomery has a history of reconciling with him, namely after he shot her in the back in 2005 while she was pregnant with his child; (2) in May of 2018, his name was on the house's lease with Montgomery, showing they were together in some sense of the term at that time, though Pea's name was removed from the lease that December; and (3) on the day before the search of Montgomery's house, Montgomery and Pea were together in Mansfield with two of their children. Pea asserts that these three facts are "adequate evidence that he and [Montgomery] had reconciled and that he was invited over on January 13, 2019" and also that the officers' testimony to the contrary should not be accorded the same weight as his testimony on this point. Record Document 30, p. 3.

This Court disagrees. First, the Magistrate Judge heard all of the witness testimony live and was able to assess the credibility of each witness. The Court is deferential to the Magistrate's ability to judge the credibility of those witnesses who testified before him in this hearing. The Magistrate found the other testimony more credible than Pea's, and that conclusion is supported by the record. Second, because Pea's arguments hinge so heavily on the concept of reconciliation, the Court points out that reconciliation does not automatically equate with an overnight invitation, which is the inferential leap the Defendant seems to be asking the Court to make. Thus, even if they had reconciled, that does not result in a finding that Pea was an invited guest.

Third, contrary to Pea's assertion that he was an invited guest, Pea admitted during his testimony that Montgomery did not invite him to spend the night. Thus, by his own admission, he was not an invited overnight guest. In contacting Pea, Montgomery simply asked for him to provide money. Pea's statements that Montgomery asked him to repair the washing machine are equivocal, at best, and certainly do not amount to convincing evidence that Montgomery invited him to her house. The Court's review of the transcript leaves the impression that, in addition to deciding to go to Montgomery's house to repair the washing machine, Pea unilaterally decided to spend the night. This is demonstrated by Pea's testimony on cross-examination:

> Q: Did she ask you to come just to give her wash money?
>
> A: Well, she wanted me to fix her washing machines, put the washing machines together, give her wash money . . . . [S]he volunteered to come pick me up, but I told her, don't worry about it, I would find a way.
>
> Q: So it wasn't to come spend the night; it was to come give her wash money?
>
> A: Well, yeah--I don't have no transportation, so, yeah, I'm going to have to spend the night.
>
> Q: But she just specifically asked for wash money?
>
> A: Yeah.

Record Document 31, pp. 49-50. Thus, Pea's own testimony clearly establishes that he was not invited as an overnight guest.

Fourth, the events that led to the police searching Montgomery's house provide circumstantial evidence corroborating Montgomery's claim- through Morrison- that Pea was not invited as an overnight guest. The scene unfolded the morning after Pea showed

up at Montgomery's house and decided to spend the night. Montgomery called 911 and reported an assault and battery. She told officers that the perpetrator, Pea, was inside her home. She stated she would not return to the home without police assistance. Looking very frightened at the time the police arrived, she told the responding officers that the night prior, while they were driving, Pea pulled a gun on her and said in front of two of their children, "I'm going to blow your head off, bitch." Record Document 31, p 6. She gave verbal permission to the officers to find and remove the gun, which she said was probably hidden inside. Record Document 31, p. 15. When police confronted Pea, who sure enough was inside Montgomery's house, he did not tell them he had been invited over. Record Document 31, p. 10.

The facts above were all established through the testimony of Officer Pollitt who was on the scene of the search. Significantly, these facts are completely unchallenged by Pea. Thus, the undisputed evidence is that this all occurred at Montgomery's home (which is no longer shared by Pea), she called the police to report an assault and battery committed by Pea, she told the police he had a firearm, and she asked the police- or at the very least, consented- to search her home to find the gun. Though it may be circumstantial, this is strong and unrefuted evidence of Montgomery's belief that Pea was not an invited guest in her home. Pea cannot defeat this evidence with speculative and unsubstantiated arguments that he and Montgomery may have reconciled.

The Magistrate Judge's credibility findings are well supported by the record in this matter and will not be disturbed by this Court. The Court adopts the finding that Pea was not an invited guest, and as such, he lacks standing to challenge the search of

Montgomery's house. That should end the Fourth Amendment inquiry there. However, out of an abundance of caution, the Court will address Pea's remaining objections.

2. Montgomery's consent to the search.

In this case, no one disputes that Montgomery verbally consented to the search of her residence. While Pea makes much of the fact that the consent to search form is missing from police records, that does not salvage his claim. A signed consent to search form is a method of documenting that consent has been given, but the absence of a signed form does not constitute an invalid search. Pea has not pointed to any jurisprudence that suggests that a signed consent form is necessary to prove valid consent. To the contrary, in United States v. Mata, 517 F.3d 279, 291 (5th Cir. 2008), the Fifth Circuit found valid consent existed when the defendant gave oral consent but refused to sign a form. The facts of the instant case are even more favorable for the Government, as there is no evidence that Montgomery withheld consent or that she equivocated in giving it. In short, the absence of a consent form is not a legal impediment when valid verbal consent has been given. All of the evidence supports a finding that Montgomery gave both verbal and written consent, and there is no convincing reason for this Court to overlook that evidence.

3. Use of hearsay testimony.

Pea objects to the use of hearsay during the suppression hearing, arguing that the Government relied so heavily on hearsay testimony that it deprived him of his right to confront and cross-examine the witnesses against him. In making this objection, Pea is specifically objecting to Morrison's use as a witness to relay Montgomery's version of

events and her tumultuous history with Pea. Pea concedes that hearsay is permitted in suppression hearings. And, he has not cited any cases under the Confrontation Clause, nor has he provided any analysis to suggest that the Magistrate's acceptance of Morrison's testimony violated Pea's Sixth Amendment rights. Indeed, Pea has cited no legal authority whatsoever.

It is well-established that the rules of evidence do not apply in suppression hearings. See F.R.E. 1101(d)(1); see also United States v. Raddatz, 447 U.S. 667, 679 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial"). However, the Fifth Circuit recently stated that "although the Sixth Amendment right to confront is a trial right, it also applies to suppression hearings." United States v. Daniels, 930 F.3d 393, 405 (5th Cir. 2019) (citing United States v. Stewart, 93 F.3d 189, 192 n.1 (5th Cir. 1996)). In this case, the Court need not resolve whether Pea's Sixth Amendment right of confrontation was violated by Morrison's testimony because such a finding does not affect the ultimate outcome. Even discounting all of Morrison's testimony and assuming arguendo that Pea was an invited guest, Pea still cannot prevail on his suppression motion. Indeed, even if he was an invited guest, Montgomery gave valid consent to the search of her home. The evidence of that consent was presented by Officer Pollitt, through live testimony, at the suppression hearing. This testimony was undisputed. Montgomery's valid consent to the search is dispositive of the entire inquiry. Thus, even without consideration of Morrison's testimony, Pea cannot prevail on his motion to suppress.

IV. Conclusion.

For the foregoing reasons, the Court **ADOPTS** the findings of the Report and Recommendation [Record Document 29] and **DENIES** Pea's motion to suppress [Record Document 21].

THUS DONE AND SIGNED this 17th day of March, 2020.

ELIZABETH E. FOOTE
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 8, 2022
Lyle W. Cayce
Clerk

No. 21-30691
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ORENTHA JAMES PEA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:19-CR-294-1

Before KING, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:*

Orentha James Pea was sentenced to 120 months of imprisonment after being convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On appeal, he contends that the district court erred in denying his motion to suppress evidence seized from his

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

estranged wife's residence. Specifically, he claims that the district court clearly erred in determining that he lacked standing and that his estranged wife was unable to consent to the search of the residence after he refused to allow the police entry.

When reviewing the denial of a motion to suppress, we review the district court's legal conclusions de novo and its factual determinations for clear error. *United States v. Tello*, 924 F.3d 782, 786 (5th Cir. 2019). There is no clear error if a factual finding is plausible in light of the record as a whole. *United States v. Perales*, 886 F.3d 542, 545 (5th Cir. 2018). "'[W]e may consider all of the evidence presented at trial, not just that presented before the ruling on the suppression motion, in the light most favorable to the prevailing party.'" *United States v. Onyeri*, 996 F.3d 274, 278 (5th Cir. 2021) (quoting *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007)). Moreover, the district court's decision may be affirmed for any reason that is supported by the record. *United States v. Escamilla*, 852 F.3d 474, 480 (5th Cir. 2017).

Regardless of whether Pea was a guest who had standing to challenge the search of his estranged wife's residence, the search was not improper because it was conducted with his wife's consent. While a co-occupant generally has the authority to consent to a search, "a physically present inhabitant's express refusal of consent to a police search is dispositive . . . regardless of the consent of a fellow occupant." *Georgia v. Randolph*, 547 U.S. 103, 122-23 (2006). However, this exception is limited and "applies only when the objector is standing in the door saying 'stay out' when officers propose to make a consent search." *Fernandez v. California*, 571 U.S. 292, 306 (2014). Because Pea objected to the search of his wife's residence after he was arrested and placed in a police cruiser, he was not physically present at the residence and was unable to override his estranged wife's consent. *See Randolph*, 547 U.S. 122-23.

Accordingly, the judgment of the district is AFFIRMED.