UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ROBERT MEDEARIS, Defendant.	CR 10-30057-RAL DEFENDANT'S OBJECTIONS TO THE REPORT AND RECOMMENDATION FOR DISPOSITION OF MOTION TO SUPPRESS

COMES NOW Defendant Robert Medearis, by and through his attorney, Assistant Federal Public Defender Edward G. Albright, pursuant to 28 U.S.C. § 636(b)(1), and makes the following objections to the Report and Recommendation for Disposition of Motion to Suppress issued by the Magistrate Judge on October 20, 2010, (Docket No. 30). Medearis requests that this Court make its own, *de novo* determination of the issues presented within the report and recommendation. *Hudson v. Gammon*, 46 F.3d 785 (8th Cir. 1995).

Medearis filed a motion and accompanying memorandum to suppress from use at trial the evidence seized by tribal police officers and statements Medearis made to tribal officers and an FBI agent. (Documents 16 and 17). The Magistrate Judge recommends denying the defense's motion in its entirety. Medearis objects to the Magistrate Judge's Report and Recommendation for Disposition of Motion to Suppress, and the findings, authorities, and legal discussion made in the written decision.

Noncompliance with Rule 41.

The Magistrate Judge found that certain provisions of FED. R. CRIM. P. 41 (sections d, e, and f), relating to the issuance, execution, and return of telephonic search warrants, were not complied with in this case. However, the Magistrate Judge concluded that Rule 41 does not apply because the telephonic warrant was issued by a tribal judge and was sought and executed entirely by tribal, not federal, law enforcement officers. The defense objects to this finding on the basis that Rosebud Sioux Tribe Supervisory Special Agent Charles Ginsbach is a federal law enforcement officer, in addition to being a tribal law enforcement officer. Ginsbach became a special agent after have completed training at a federal law enforcement training center. (Transcript of Motions Hearing, p. 6). He is employed as a law enforcement officer by the Rosebud Sioux Tribe pursuant to a 638 contract (TMH, p. 106) with the federal government, thereby making him a federal officer under 18 U.S.C. § 1114. As such, he is deemed a federal officer for an assault offense under 18 U.S.C. § 111, Assaulting a Federal Officer. If a RST law enforcement officer is treated as a federal officer when someone assaults him in the course of his tribal law enforcement duties, then that same officer should be subject to the federal search and seizure rules when conducting a search in the course of his tribal law enforcement duties. In that Ginsbach is a federal officer, he was required to adhere to Rule 41, and his failure to do so should result in suppression of the evidence seized. The defense asserts that the telephonic search warrant Ginsbach obtained failed to comply with the requirements of FED. R. CRIM. P. 41(d)(3); 41(e)(3); and 41(f)(1).

The defense asserts that the Court can take judicial notice of the fact that Ginsbach, as an employee of RST law enforcement, is deemed a federal officer due to the 638 contract the Tribe has with the federal government, based upon evidence of prior RST assault on federal officer cases that have come before this Court. However, if further evidence is required to establish this fact, the defense would ask the Court to remand the matter to the Magistrate Court to permit the taking of further testimony that Ginsbach is a federal officer. The evidence would show that Ginsbach was employed as a law enforcement officer with the Rosebud Sioux Tribe pursuant to a contract of the Tribe with the Department of Interior, Bureau of Indian Affairs, granting authority under 25 U.S.C. § 2804 to perform law enforcement functions, and was engaged in the performance of his official duties when he searched Medearis's residence.

Constitutionality of the Search.

Ginsbach had a signed search warrant permitting him to search and seize the red 1997 Chevrolet pickup. Any other evidence seized, particularly the windshield, axe, and hammer, as well as photos taken of the same, were seized in violation of Medearis's Fourth Amendment rights. Ginsbach relied on an impermissible telephonic search warrant which was not validly issued, was based on unsworn and unrecorded testimony, and unsigned by the issuing judge. All these facts resulted in a telephonic search warrant that was not issued in accordance with the Warrants Clause of the Fourth Amendment. For these reasons, the search pursuant to the telephonic search warrant issued by Judge Sully was unconstitutional, and the evidence seized pursuant to that warrant must be suppressed.

The Magistrate Judge concluded that the search and seizure of the aforementioned evidence was constitutional under the "good-faith exception" to the warrant requirement as outlined in *United States v. Leon*, 468 U.S. 897 (1984). The defense objects to this finding and recommendation, and asserts that the *Leon* "good-faith exception" does not apply in this case to cure the illegal search and seizure.

Leon cases focus on a magistrate judge's probable cause determination or other errors made by the issuing judge. Because the phone conversation was not recorded, this Court has no recording of what was actually said during the conversation, other than to rely on the witnesses memory of eight months prior. Even if the information Ginsbach provided to Judge Sully was sufficient to show probable cause, it is Ginsbach's conduct that constitutes the Warrant Clause violation. Ginsbach was not under oath while providing the information to Judge Sully for the second search. (TMH, p. 82). Ginsbach did not provide to the court the written affidavit or search warrant pertaining to the second search until ten days after he seized the evidence. In fact, he claimed that he has ten days after executing a search warrant to prepare the search warrant affidavit and present it to the court, which is not supported by an statute or rule. (TMH, p. 32). Finally, Ginsbach did not have Judge Sully sign the affidavit and search warrant pertaining to the second search, but instead had a different judge do so. Judge Emery signed the search warrant on February 12, 2010, but Ginsbach improperly dated the judge's signature as being made on February 2, 2010. (TMH, p. 33-35). These are not Judge Sully's errors, but instead show that Ginsbach lacked a reasonable good faith belief in the propriety of his actions, as required under *Arizona v. Evans*, 514 U.S. 1 (1995). Ginsbach's conduct in preparing the second search warrant

was deceptive. He had an unrelated judge sign the search warrant on February 12, 2010, for a search that was conducted on February 2, 2010. On its face, the search warrant deceives the reader to believe that the judge actually signed it on February 2, 2010, because Ginsbach wrote that date next to the judge's signature line, when in fact, it wasn't actually signed until February 12, 2010.

The defense objects to the Magistrate Judge's characterization that the second search warrant was a "follow-up" to the first warrant, and that it was arguable that Ginsbach even needed to contact Judge Sully and obtain permission to expand the search. The first search warrant was for the pickup truck, nothing more. Even Ginsbach testified that he needed another warrant in order to search for and seize the removed windshield. (TMH, p. 69). Ginsbach agreed that the ax and hammer were not specified in the original warrant, nor did the original warrant permit him to search the location where the windshield was ultimately found. (TMH, p. 52-53). The second warrant even states that it is to seize the "front windshield" of the pickup. The second warrant was not a follow-up, but instead a warrant to obtain additional evidence that was not covered by the first warrant. The defense, therefore, objects to the Magistrate Judge's recommendation that the first warrant allowed for the search of the removed windshield.

Ginsbach understood the need for a search warrant to search for and seize the windshield, and that is why he contacted Judge Sully to make such request. The failure to record the conversation; the failure to be placed under oath; the failure to present the second affidavit and search warrant to the issuing judge; and then waiting ten days to have another judge sign the second affidavit and search warrant (which was never explained by Ginsbach as to why it took so

long to do so); all combined, show the lack of good faith and objective reasonableness exhibited by Ginsbach which negates the application of the *Leon* "good faith exception."

The Magistrate Judge cites cases in which involve one or another defect mentioned above. However, none of the cases involve all of the defects that were present in Medearis's case. For example, in *United States v. Hessman*, 369 F.3d 1016 (8th Cir. 2004), the magistrate judge signed the warrant and faxed it to the officer before its execution, something that did not occur in Medearis's case. Other cases involved the magistrate judge's failure to record, transcribe, and certify the officer's oral statements, which is only one of the several defects in Medearis's case.

Ginsbach testified that he really didn't know if telephonic search warrants were authorized by the Rosebud Sioux Tribe Law and Order Code. (TMH, p. 64). The Code was submitted as evidence (Exhibit 6), and it does not appear to authorize telephonic search warrants. Ginsbach testified that he had criminal investigator training on how to conduct a telephonic search warrant. (TMH, p. 64). The BIA-Office of Justice Services "Law Enforcement Handbook," which was also submitted as evidence (Exhibit 5), authorizes telephonic search warrants, but requires the tribal police officer to contact the Assistant United States Attorney or other appropriate prosecutor and receive authorization for the warrant before contacting the judge. It also requires that the officer prepare an affidavit for the search and provide it to the court within twenty-four hours of the execution of the warrant. Ginsbach complied with neither of these requirements.

Judge Sully testified that the tribal courts look to the federal rule of criminal procedure for something not covered by the Rosebud Sioux Tribal Law and Order Code, such as telephonic search warrants. (TMH, p. 83-84). Judge Sully agreed that the federal law procedures were not complied with in Medearis's case. (TMH, p. 84).

The defense objects to the Magistrate Judge's findings that Ginsbach's conduct in honoring the warrant was not objectively unreasonable, and that any errors were Judge Sully's fault. As argued above, the defense asserts that the errors, and the reckless disregard with complying with the telephonic warrant requirements, falls on Ginsbach. The defense objects to the Magistrate Judge's characterization of what occurred here as being just some procedural error by the judge, or some technical error by Ginsbach. It was clearly police misconduct, in bad faith, to not follow the rules and requirements in obtaining a telephonic warrant. The outcome violated Medearis's Fourth Amendment rights, and the penalty for such violation is suppression of the evidence seized.

February 2, 2010 Statements.

A. Voluntariness.

The defense asserts that the statements Medearis made were involuntary under the Fifth Amendment to the United States Constitution and must be suppressed. The Court must look at the "conduct of the officers and the characteristics of the accused." *United States v. LeBrun*, 363 F.3d 715, 724 (8th Cir. 2004). The issue is "whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination." *United States v. LeBrun*, 363 F.3d 715, 725 (8th Cir. 2004).

The Magistrate Judge concluded that it was unable to find that the officers overbore Medearis's will and capacity for self-determination so as to make his statements involuntary. The defense objects this factual finding and legal recommendation, and asserts that Medearis's will and capacity for self-determination was overborne. The defense also objects to the Magistrate Judge's finding that it evaluated "Medearis's ability to resist pressure and inducements brought to bear on him," because there was no testimony from Medearis indicating he had such an ability to resist the pressure and inducements. It is the burden of the government to prove by a preponderance of the evidence that the statements were voluntary. *Colorado v. Connelly*, 479 U.S. 157 (1986). The defense asserts that the testimony does not establish by a preponderance of the evidence that Medearis's statements were voluntary, and therefore, all of his statements must be suppressed as violating the Fifth Amendment.

B. Custody.

Medearis's statements made inside his residence were obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). To determine if an individual is placed into custody for *Miranda* purposes, the Court must consider the circumstances surrounding the interrogation and whether a reasonable person would have felt he was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

The Magistrate Judge found that Medearis was not in "custody" within the meaning of *Miranda*, and cited several factors supporting its conclusion. The defense objects to the Magistrate Judge's factual finding and legal recommendation, as well as the factors allegedly supporting that decision.

Ginsbach ordered three police officers to go into the residence and detain the occupants in the residence. (TMH, p. 47). Medearis remained detained by these officers from the point in time Ginsbach ordered the police to enter the house and detain the occupants, until after Ginsbach found the windshield and placed Medearis under arrest. (TMH, p. 49). Ginsbach testified that Medearis was not free to leave. (TMH, p. 50). While Medearis was detained in the kitchen, Ginsbach asked him where the windshield was. (TMH, p. 51). Ginsbach did not advise Medearis of his rights under *Miranda*. (THM, p. 51). The testimony at the motion hearing clearly showed that Medearis was detained in his kitchen, not free to leave, and questioned about the location of the evidence in issue in this case (one likely to elicit an incriminating response), all of which was done without the advisement of *Miranda*.

The fact that Medearis was not handcuffed or physically restrained, or not placed under arrest immediately after the questioning, is not required for one to be in custody. Ginsbach testified that Medearis was detained in the kitchen and not free to leave. That constitutes constitutes custody under *Miranda*.

The fact that Medearis responded to Ginsbach's question does not mean he "spoke freely." Medearis was never given the choice, nor advised of his constitutional right, not to speak. The length of the questioning, and the use of strong-arm tactics or deceptive stratagems are voluntariness factors, not custodial factors. The atmosphere was clearly police-dominated, where there was Ginsbach and three other officers were in the house detaining Medearis while questioning him. Anyone in Medearis's shoes would have understood he was in custody. Ginsbach's own testimony provides proof of that. Therefore, Medearis statements inside the

house should not only be suppressed as involuntary under the Fifth Amendment, but also as taken in violation of *Miranda*.

C. "Tainted" Fruit.

Medearis moved for suppression of his statements because they were the "tainted fruit" of the Fourth Amendment violation. The Magistrate Court recommends denial of this motion based on its application of the *Leon* good-faith exception to the exclusionary rule. The defense objects to the Magistrate Judge's recommendation, and to its application of the *Leon* good-faith exception. Medearis argues that under the Fourth Amendment's Exclusionary Rule, the statements obtained during the illegal search must be suppressed under *Wong Sun v. United States*, 371 U.S. 471 (1963), and the statements made following the warrantless arrest of Medearis inside his residence must be suppressed under *Payton v. New York*, 455 U.S. 573 (1980).

February 3, 2010 Statements.

The defense moved to suppress Medearis's February 3, 2010, statements on the grounds that they were the fruit of the illegal search and questioning of Medearis which occurred on February 2, 2010. The Magistrate Judge denied the defense motion because the search did not violate the Fourth and Fifth Amendments. The defense objects to the Magistrate Judge's finding and recommendation, and asserts that under *Wong Sun v. United States*, 371 U.S. 471 (1963), the illegality flowing from the February 2 events tainted, and renders inadmissible, the February 3 statements.

Conclusion.

Defendant Medearis incorporates by this reference the arguments and authorities set forth in his motion and memorandum to suppress and requests this Court grant his motion.

WHEREFORE, the defense objects to the Magistrate Judge's Report and Recommendation for Disposition of Motion to Suppress in its entirety, and requests this Court grant Defendant's motion to suppress.

Dated this 2nd day of November, 2010.

Respectfully submitted,

NEIL FULTON
Federal Public Defender
By:
/s/ Edward G. Albright

Edward G. Albright, Assistant Federal Public Defender
Attorney for Defendant
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
124 S. Euclid, Suite 202
Pierre, SD 57501
Telephone: 605-224-0009 Facsimile: 605-224-0010
Filinguser_SDND@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2010, a true and correct copy of the Defendant's Objections to the Report and Recommendation for Disposition of Motion to Suppress was served upon the following person, by placing the same in the service indicated, as follows:

Eric Kelderman	[ ]	U.S. Mail
Assistant U.S. Attorney	[ ]	Hand Delivery
225 S. Pierre Street, #337	[ ]	Facsimile
Pierre, SD 57501	[X]	Electronic Case Filing

/s/ Edward G. Albright

Edward G. Albright, Assistant Federal Public Defender