

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

UNITED STATES OF AMERICA)	
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)	
v.)	2:03 CR 97 PS
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)	
JONAS DERRICO SMITH)	

ORDER

This matter is currently before the Court on the Motion to Suppress (Docket No. 19) of Defendant Jonas Derrico Smith. Smith is charged with possession of crack cocaine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). The charges arise from evidence obtained during a search of a residence located at 4912 Homerlee Avenue, Apartment 2F in East Chicago, Indiana belonging to Smith's girlfriend, Cynthia Anderson. A hearing on Smith's Motion to Suppress was held before the undersigned on March 12, 2004 and continued on March 18, 2004. Because the Court finds that Anderson consented to the search of her apartment and for the additional reason that Smith voluntarily disclosed the presence and location of drugs, Smith's Motion is DENIED.

FACTS

In the fall of 2003, Sergeant Arcuri of the East Chicago Police Department received a series of anonymous tips regarding drug activity at 4912 Homerlee Avenue, Apartment 2F in East Chicago, Indiana. On Friday November 7, 2003, at approximately 11:30 a.m., Sgt. Arcuri along with a partner, Police Officer Arona, went to the residence located at 4912 Homerlee Avenue, Apartment 2F. The officers knocked on the door, announced their presence and identified themselves. Defendant Jonas Smith answered the door and at first held the door

slightly ajar as he spoke with the officers. Sgt. Arcuri and Officer Arona asked Smith for permission to enter the premises and Smith told the officers to wait a moment. Smith then closed the door momentarily before reopening the door and inviting the officers into the apartment. Upon entering the apartment, Sgt. Arcuri sat down with Smith to his right at a kitchen table located just inside of the apartment entrance. Officer Arona stood a couple of feet away from the table and closer to the front door. Sgt. Arcuri explained to Smith the reason for their visit and asked Smith for permission to search the apartment for narcotics. Smith responded that the apartment belonged to his girlfriend, Cynthia Anderson, and that he did not have the authority to grant permission to search.

As the officers were about to leave, Anderson arrived at the apartment. Smith himself got up from the table to help let her in. After entering the apartment, Sgt. Arcuri asked Anderson to join him and Smith at the kitchen table. Anderson sat to the left of Sgt. Arcuri and Smith to the right. Sgt. Arcuri then explained to Anderson that they had received complaints of drug activity coming from her apartment and asked Anderson for consent to search the apartment. According to the testimony of both Arcuri and Arona, Anderson appeared surprised that the officers were in her apartment for such a purpose and indicated that there should not be any drugs in the apartment because she had children there. Anderson then indicated that she would consent to a search of her apartment.

Sgt. Arcuri presented Anderson with a consent to search form, explained the form, and then read the contents of the form aloud to Anderson. Anderson signed the consent to search form at the bottom and handwrote certain biographical information including her date of birth, social security number, phone number and her height and weight. Anderson's consent states, "I

hereby voluntarily and of my own free will, without any threats, duress or coercion of any kind or nature, give my permission to the following police officers – Sgt. Arcuri [and] Off. L. Arona – to search, without warrant, the following described possessions or premises under my control: 4912 Homerlee Avenue, Apt. #2F, E.C., IN 46312.”

While Sgt. Arcuri and Anderson were discussing her consent to search, both Sgt. Arcuri and Officer Arona observed that Smith was becoming increasingly nervous, with sweat gathering on his forehead. At some point during the officer’s conversation with Anderson, one of the children present in the apartment began to cry and Smith asked permission to go change the baby which he did before returning to the kitchen table. When Smith returned, Anderson indicated she would consent to a search of the apartment and signed the consent form.

During this time, Smith again got up from the table and began pacing around. The officers asked Smith, in a calm tone, to come back and sit at the table. The officers did not threaten Smith or display any force when asking him to return to the table. Shortly thereafter, while Arcuri resumed talking with Anderson, Smith volunteered to the officers that there were drugs in the apartment and that the drugs belonged to him and not Anderson. Smith told the officers that he would show them where the drugs were and then led the officers to a blue storage container in the bedroom where the officers discovered a bag containing crack cocaine. After locating the drugs, the officers placed Smith under arrest and read him his *Miranda* rights. After Smith was under arrest, the officers led Anderson into the bedroom to show her the drugs that had been found in her apartment. Smith again made a statement to the officers that Anderson had nothing to do with the drugs.

DISCUSSION

I. Anderson's Consent to Search

A warrantless entry of a home for the purpose of making an arrest or conducting a search ordinarily violates the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 585 (1980); *United States v. Rosario*, 962 F.2d 733, 736 (7th Cir. 1992). The Fourth Amendment's prohibition against unreasonable searches and unreasonable seizures extends beyond the four walls of the home to protect the legitimate privacy expectations of an accused in an invaded place. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *Katz v. United States*, 389 U.S. 347 (1967). In this case, because Smith was a repeated overnight guest in Anderson's home, he has standing to assert the Fourth Amendment here. *See Minnesota v. Olson*, 495 U.S. 91, 96-7 (1990) (affirming rule that a defendant's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable").

An exception to the general rule forbidding warrantless invasion, however, permits authorities conducting a search to enter a dwelling without a warrant if they obtain voluntary consent from the individual whose property is to be searched. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *see also United States v. Drayton*, 536 U.S. 194, 201 (2002) (noting that validity of consent is determined by the totality of the circumstances). The government bears the burden of proving by a preponderance of the evidence that consent to search was voluntarily given. *Id.* at 222. Factors to be considered by the Court in determining whether consent was voluntary include the age, education, and intelligence of the individual giving consent; whether the individual was advised of her rights; how long the individual was detained prior to giving consent; whether there were repeated requests for consent; whether any physical coercion was

used; and whether the individual was in custody. *United States v. Taylor*, 196 F.3d 854, 860 (7th Cir. 1999); *United States v. LaGrone*, 43 F.3d 332, 334 (7th Cir. 1994).

In the first instance, it is not disputed that the government had consent from Smith himself to enter the premises of 4912 Homerlee Avenue, Apartment 2F. Upon their arrival at the apartment, Sgt. Arcuri and Officer Arona knocked on the door, announced their presence and identified themselves as police officers. Smith answered the knock and when asked by the officers for permission to enter the apartment for the purposes of asking questions, he invited the officers to enter. No guns were drawn, no force shown and no coercion was used to enter the premises. Thus, the Court can only conclude that Smith's consent to enter the apartment was freely and voluntarily given.

Similarly, the totality of the circumstances demonstrates that Ms. Anderson, the leaseholder of the apartment, freely and voluntarily consented to a search of her apartment and that her consent was not coerced or a product of duress. The evidence at the hearing showed that upon entering her own apartment, Anderson freely sat around her kitchen table with her boyfriend, Jonas Smith, and Sgt. Arcuri. Neither Anderson nor her boyfriend were restrained in any fashion and no force or weaponry was displayed by Sgt. Arcuri or Officer Arona. Indeed, the testimony at the hearing demonstrated that Smith was free to get up from the table to help let Anderson into the apartment and to leave the table again to go change his child's diaper.

While seated around her own kitchen table, Anderson was advised by the officers of the reasons for their visit including the reports they had received about drug activity coming from her apartment. Both Sgt. Arcuri and Officer Arona testified credibly that Anderson seemed surprised that the officers were in her apartment for such a purpose and that drugs should not be

present in the apartment because there were children there. Sgt. Arcuri then asked Anderson whether she would consent to a search of her apartment. She was not in custody when the consent was requested (or anytime thereafter for that matter). Moreover, Anderson appears to be of average intelligence and holds a full time job at Walmart. After indicating that she would consent, Sgt. Arcuri presented a written authorization form consenting to the search. Sgt. Arcuri explained the authorization form to Anderson and then read the contents of the authorization form aloud to Anderson. Anderson then signed the form and handwrote her phone number, social security number, date of birth, height and weight below her signature.

During her testimony, Anderson at first suggested that she did not know or understand what she had signed, that she never read the consent form, and that the consent form was never read to her. Later when confronted with the consent form, Anderson claimed that the form introduced by the government was not the one she signed on November 7, 2003, suggesting that she may have signed the form at some later time with the form having been back dated. However, Anderson admitted under cross-examination that the form was dated November 7, 2003 and reflected her signature as well as her biographical information in her handwriting. Anderson also testified that Sgt. Arcuri threatened her with the potential loss of her children if she did not consent.

Ultimately, the Court does not find Anderson's testimony credible. For instance, the government produced the original consent form with Anderson's original signature as well her phone number, date of birth, social security number, height and weight all in Anderson's original handwriting. Any suggestion by Anderson that she did not actually sign the consent form – or that she signed it some other time and the date was changed – is simply not credible. Indeed, far

from being coerced, the credible evidence suggests that Anderson actually welcomed the search because she did not like the prospect of drugs being in her apartment with her children. In addition, the suggestion that she was coerced into signing the form is belied by the testimony of the two officers and by the form itself which explicitly states that Anderson was giving her consent “voluntarily and of [her] own free will” and “without any threats, duress or coercion of any kind or nature.”

In contrast, the Court finds that both Sgt. Arcuri and Officer Arona testified credibly that Anderson’s consent was voluntarily given. Both testified that at no point during their conversation with Anderson did they display any weapons or use any physical force. Further, both testified that after Anderson indicated she would consent to a search, Sgt. Arcuri explained the consent form to her and then read the consent form aloud to her before she signed it. Finally, both testified credibly that no threats or coercion were brought to bear against Anderson in persuading her to sign the consent form. Anderson was free, if she desired, to refuse to sign the consent form. Thus, the evidence shows that Anderson voluntarily consented to a search of her apartment.

Finally, the Court notes that the Seventh Circuit has found consent voluntary under circumstances similar to those present here. *See, e.g., United States v. Navarro*, 90 F.3d 1245, 1256-57 (7th Cir. 1996) (consent to search voluntary when given in a “calm and relaxed” atmosphere and defendant had signed a consent form that stated “I sign this form freely and voluntarily,” despite claim that did not understand English well); *LaGrone*, 43 F.3d at 334 (finding consent to search voluntarily given when defendant was held in custody for less than 15 minutes and asked to consent more than once); *United States v. Saddah*, 61 F.3d 510, 518 (7th

Cir. 1995) (finding consent to search voluntarily given where defendant had told officers she had nothing to hide and signed a form that indicated “I have not been threatened nor forced in any way...I freely consent to this search.”); *United States v. Duran*, 957 F.2d 499, 502-03 (7th Cir. 1992) (finding consent voluntary and noting that the “potentially coercive effect of her custody, however, was mitigated by the circumstances; [she] was arrested during the day and without a show of force, was not kept under close restraint at the station, and was not subject to an aggressive display of weaponry, and was not harshly interrogated-in fact, [she] characterized [the officer’s] conversation with her as ‘gentlemanly.’”).

In sum, Anderson consented to the search of her apartment. Thus, Smith’s claim that the evidence found during the search should be suppressed because the Fourth Amendment was violated must fail.

II. Smith’s Voluntary Statements

As discussed above, the officers obtained consent to search Anderson’s apartment. As a result, Smith most assuredly knew that the officers would likely find the drugs in the search, so he volunteered to the officers that there were drugs in the apartment, that the drugs belonged to him and where the drugs were located. The Court finds that Smith’s statement as well as the ultimate recovery of the drugs were lawfully obtained.

It is axiomatic that suspects must be advised of certain constitutional rights before being subjected to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Abdulla*, 294 F.3d 830, 834 (7th Cir. 2002). Specifically, a person who has been “taken into custody or otherwise deprived of his freedom of action in any significant way” must be “warned that he has a right to remain silent, that any statement he does make may be used as evidence

against him, and that he has a right to the presence of an attorney, either retained or appointed.”
Id.

However a suspect must be both in custody and subject to interrogation before the protections of *Miranda* apply. *United States v. Scheets*, 188 F.3d 829, 840 (7th Cir. 1999). A person is “in custody” when his movement is restrained to the degree comparable to a formal arrest. *United States v. Yusuff*, 96 F.3d 982, 987 (7th Cir. 1996). This inquiry is based on “how a reasonable man in the suspect's position would have understood his situation.” *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *see also United States v. Salyers*, 160 F.3d 1152, 1159-60 (7th Cir. 1998) (no custody during execution of search warrant because defendant not placed in any type of restraint nor told not free to leave); *United States v. James*, 113 F.3d 721, 727 (7th Cir. 1997) (*Miranda* warnings not required because defendant was being interviewed in his own office into which he had invited the officers).

Interrogation is defined as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *United States v. Westbrook*, 125 F.3d 996, 1002 (7th Cir. 1997) (stating the test as “whether a reasonable objective observer would have believed that the...question[] claimed by [the defendant] to have been unlawful interrogation [was] in fact ‘reasonably likely to elicit’ an incriminating response.”). If an accused makes a statement in response to some words or actions by the police that do not constitute interrogation, or if an accused himself initiates further communications, the police are not prohibited from “merely listening” to his voluntary statement. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001).

In this case, Smith was neither in custody nor subject to interrogation when he volunteered to the officers that drugs were present in the apartment and that the drugs belonged to him and not Anderson. First, the evidence shows that Smith was not in custody. When Sgt. Arcuri and Officer Arona knocked on the door and asked for permission to speak with Smith, Smith invited them into the apartment. During the entire time Sgt. Arcuri and Officer Arona were in the apartment leading up to Smith's statement, Smith was not restrained in any manner nor did Sgt. Arcuri or Officer Arona display their weapons or use any physical force in their dealings with Smith. In fact, Smith freely got up from the table and helped let Anderson into the apartment when she arrived. Minutes later, Smith was again allowed to leave the kitchen table to go change one of the children's diapers. Finally, when Smith got up and began pacing in the kitchen in a nervous fashion as Anderson was giving her consent to search, the officers calmly, and without any show of force, asked Smith to return to the kitchen table. The Court concludes that a reasonable person in Smith's position would not have felt like he or she was "in custody" in this situation.

The Court also finds that Smith's inculpatory statements came at a time when the officers were not even speaking to him, let alone interrogating him. *See Miranda*, 384 U.S. at 478 ("[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."); *Briggs*, 273 F.3d at 740-41 (statement lawfully obtained where defendant himself initiated further communication with police). In this case, Sgt. Arcuri and Officer Arona both testified credibly that Smith volunteered the presence and location of drugs in the apartment while Sgt. Arcuri and Officer Arona were talking with Anderson about her consent to search the apartment and not Smith. Accordingly, the Court finds

that the officers were not interrogating Smith at the time of his statements and thus were free to listen to anything Smith had to say.

CONCLUSION

Because the Court finds that Anderson voluntarily gave her consent to a search of her residence located at 4912 Homerlee Avenue, Apartment 2F and for the additional reason that Smith admitted to the presence and location of the drugs at a time when Smith was neither in custody nor subject to interrogation, Smith's Motion to Suppress (Docket No. 19) is **DENIED**.

SO ORDERED.

ENTER: April 27, 2004

S/ Philip P. Simon
Philip P. Simon, Judge
United States District Court