UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

MARK ADAM CITTERMAN,
Defendant.

CR 17-10036

REPORT AND RECOMMENDATION
ON DEFENDANT'S
MOTION TO SUPPRESS

Defendant is charged as a Felon in Possession of Firearms in Violation of 18 U.S.C. §§922(g)(1) and 924(a)(2). The firearms were discovered and seized during the investigation of a fire at Defendant's home on August 18, 2017.

The Indictment alleges the following seven firearms were illegally possessed:

1. Phoenix Arms Company model HP22A, .22 caliber semiautomatic handgun bearing serial number 4403763;
2. Intratec model Tec-22, .22 caliber semi-automatic handgun bearing serial number 066132;
3. J.C. Higgins model 583.1, 12 gauge caliber bolt action shotgun with no visible serial number;
4. Savage model Axis, .223 caliber bolt action rifle bearing serial number J342867;
5. Stevens model 77D, 20 gauge caliber pump action shotgun with no visible serial number (manufactured by Savage Arms Corporation);
6. Henry Repeating Rifle Company model H001, .22 caliber lever action rifle bearing serial number 426947H; and
7. Glenfield model 70, .22 caliber semi-automatic rifle bearing serial number 20490525.

Defendant's home was searched on August 22, 2017 (four days after the fire and four days after the firearms were seized) pursuant to a search warrant. That same day, Defendant was questioned by Deputy Cory Borg. Defendant was also questioned by Deputy Fire Marshall Steve Harford around Thanksgiving of 2017.

Defendant filed a Motion to Suppress Evidence and Statements (Doc. 24) and asks the Court to suppress "any evidence, and the fruits thereof, stemming from the warrantless search of his residence on August 18, 2017, on the ground the search was

not supported by exigent circumstances and the search violated his Fourth Amendment rights."

Exhibit B of Defendant's Memorandum in Support of Motion to Suppress Evidence and Statements, (Doc. 25), indicates that Sgt. Cory Borg interviewed Defendant on August 22, 2017.

Defendant did not base his motion on either the Fifth or Sixth Amendments

Defendant's home in Astoria, South Dakota burned on August 18, 2017. Deputy Fire Marshall Steve Harford assisted with the investigation of the fire that night. Harford has many years of experience and extensive training. He is a certified fire investigator and has been trained in evidence collection.

When Harford arrived, emergency personnel including firefighters and law enforcement officers were present. The fire was out. Harford entered the home to investigate the origin and cause of the fire. He quickly determined that the origin of the fire was in the living room, which was the first room he entered.

Harford's investigation was conducted at approximately 8:45 P.M. Deputy Ty Wik assisted. Initially, Deputy Wik's only responsibility was to shine a light into the house from the outside to illuminate the house during Harford's investigation.[1]

At some point, Deputy Wik told Harford that he was standing on a gun. Harford had not previously noticed the gun.

Harford continued into the first floor bedroom although there was no indication that the fire had originated in the bedroom or that the cause of the fire was in the bedroom. By this time, Harford had been told the fire was out, the original of the fire was apparent, and Harford himself had observed that the fire had been extinguished. No concern for hot spots was given by Harford.[2]

After entering the bedroom, Harford found a marijuana bong. Harford located other items that he believed to be drug paraphernalia. Hartford even opened some containers that he believed were drug-related. Those containers had no relationship to the fire investigation.

After discovering the gun and drug related items, Harford directed Deputy Wik (who apparently has no training in fire investigations) to enter the house to assist in the

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[1]Deputy Wik's experience is very limited compared to Harford and Sgt. Borg. Harford had been with the Deuel County Sheriff's Office for just over a year at the time of this investigation.

[2]Harford did state that he normally looks for hot spots during an investigation, but nothing in his testimony gave any indication that there was a concern for hot spots during this investigation.

investigation. At this point, the scope of the investigation had changed from a fire investigation to a criminal investigation related to the drugs and paraphernalia. The drug investigation was not related to the pending charges in this case as neither Harford nor Deputy Wik had any information that led them to believe Defendant was prohibited from owning firearms. Defendant's felony record was not known to either Harford or Deputy Wik when the guns were seized.

As Deputy Wik entered the house at Harford's request, he found four guns: two .22 caliber rifles found near the rear entrance of the home, a 12 gauge shotgun, and a .223 caliber rifle leaning up against a wall.[3]

At the hearing, only Hartford and Wick testified for the prosecution. Sgt. Borg did not testify at the hearing so the circumstances surrounding the August 22 search warrant and his interview of Defendant on the same day are unknown. In fact, the evidence presented at the hearing did not give the Court any information about that interview. [4]

Defendant was also interviewed by Harford around Thanksgiving of 2017. No evidence of that interview was presented by the prosecution.

ANALYSIS

This Court will sequentially discuss law enforcement's steps in the investigation of this case and the prosecution's justification for seizure of the guns and the admission of statements made by Defendant.[5]

On August 19, 2017, Deputy State Fire Marshal Steve Harford entered Defendant's fire damaged home to conduct a search to find the origin and the cause of the fire. The fire had been extinguished prior to the search. Harford did not have a search warrant.

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[3]Although the guns were not identified by serial numbers or other further description at the hearing, Deputy Wik apparently found the guns that are listed as numbers 3, 4, 6, and 7 in the Indictment. Harford may have received one of the pistols from a firefighter. How the other guns were discovered is unknown.

[4]The prosecution's supplemental memorandum (Doc. 36) provides some detail about Sgt. Borg's interview of Defendant, but that information was not presented at the evidentiary hearing.

[5]Generally, the discussion will follow the order of Government's Memornadum in Resistance to Defendant's Motion to Suppress . Doc. 28.

> The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Ordinarily, evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule and, therefore, cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Cannon*, 703 F.3d 407, 412 (8th Cir. 2013)

United States v. Houck, 888 F.3d 957, 959 (8th Cir. 2018).

Because this was a warrantless search, it is per se unreasonable in the absence of recognized exception. *Katz v. United States,* 389 U.S. 347, 357 (1967).

A. Exigent circumstances justified Harford's entry into Defendant's home.

The initial entry into the house by Harford was legal based on exigent circumstances. Harford's objective was limited to investigate the cause and origin of the fire. Doc. 28 on page 6.[6]

Defendant does not challenge Harford's initial entry into the home to investigate the fire's origin, cause, and to ensure against rekindling. Defendant's Memorandum in Support of Motion to Suppress Evidence and Statements (Doc. 25) on page 3.

B. The community caretaker doctrine does not apply.

Harford's warrantless entry into Defendant's house was justified as stated above. Consequently, there is no need to apply the community caretaker doctrine.

However, when Harford arrived on scene, the fire was extinguished and, although exigent circumstances are not challenged by Defendant, no emergency existed. The fire was out. No people were inside a burning building. The community caretaker doctrine applies only when an officer faces an emergency that requires action without a warrant. *United States v. Harris*, 747 F.3d 1013, 1017–18 (8th Cir. 2014).

C. The plain view doctrine does not allow the seizure of the firearms found within Defendant's home.

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[6]The prosecution continues to attempt to justify Harford's initial entry by a need to ensure against rekindling. The evidence presented to the Court does not support that as a need to enter the home. The fire was extinguished.

The Court makes two key observations:

1. A major portion of the evidentiary hearing related to the drugs and drug paraphernalia found in Defendant's house. This is not a drug case. Whether the seizure of drugs and paraphernalia came under the plain view doctrine will be left for any court addressing those possible crimes.

2. When the firearms were seized, neither Harford nor Deputy Wik had any reason to believe Defendant possessed the firearms illegally.

The plain view doctrine allows officers to seizure of evidence without a warrant if they are lawfully in a position from which they view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object. *United States v. Muhammad*, 604 F.3d 1022, 1027 (8th Cir. 2010).

Deputy Wik was able to view the firearm at Harford's feet from a lawful position as he provided lighting for Harford's investigation.

Any incriminating character of the firearm was not apparent at that time. For all Harford and Deputy Wik knew at the time the firearm was observed, Defendant legally possessed the firearm.

The lack of any apparent incriminating nature of the other firearms also takes them outside of the plain view doctrine exception to the search warrant requirement. Additionally, the other firearms were discovered after the fire investigation turned into a criminal investigation and after Deputy Wik, whose only involvement in the fire investigation as holding a light, became an active participant in the criminal investigation.

One or more of the guns were found only after gun cases were opened. That fact further undermines the prosecution's plain view argument.

The prosecution cites *United States v. Nichols*, 344 F.3d 793, 799 (8th Cir. 2003) in support of its plain view argument. Factually, *Nichols* is easily distinguishable. That case involved guns "in close proximity to a plethora of drugs and drug-related equipment" and the officers, at the time of the seizure, "were of Nichols's prior criminal record, likely making him ineligible to possess the firearms."

Here, the officers had no knowledge of Defendant's prior criminal record and the proximity of the firearms to the limited amount of drugs and paraphernalia is not established.

D. The inevitable discovery doctrine is not supported by the evidence presented to the Court.

> Courts use the suppression of evidence under the exclusionary rule as a remedial device that is " 'restricted to those areas where its remedial objectives are thought most efficaciously served.' " *Segura v. United States,* 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (quoting United *States v. Calandra,* 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)). "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' " Id. (citations omitted). To have evidence that was obtained after a constitutional violation admitted into court, the government must show that it was not obtained "by exploitation of that illegality [but] instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Evidence is purged of taint and should not be suppressed "[I]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

United States v. McManaman, 673 F.3d 841, 846 (8th Cir. 2012)

McManaman holds that the inevitable discovery exception applies when the government proves by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation.

The prosecution relies on a search warrant[7] obtained on August 22, 2017 – four days after the fire – as the basis to argue that the firearms would have been inevitable discovered even though the firearms were initially seized illegally.

The search warrant was obtained by Sgt. Borg who did not testify at the evidentiary hearing. The Affidavit in Support of Request for Search Warrant lists fifteen purported characteristics of illegal drug traffickers that appears to be boilerplate language for such affidavits. The Affidavit then states:

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[7]The prosecution submitted the Affidavit in Support of Request for Search Warrant and Search Warrant after the hearing at the request of the Court.

- South Dakota State Fire Marshall[8] investigated the fire at Defendant's house on August 18, 2017.
- The South Dakota State Fire Marshall found several firearms and illegal drug materials at the house.
- Sgt. Borg determined Defendant is a felon.
- Sgt. Borg determined one of the firearms was believed to have been stolen.

Sgt. Borg is an experienced and trained law enforcement officer. The Affidavit states that he has more than 10 years of experience, he has attended numerous training programs and even serves as an instructor for law enforcement.

Without Sgt. Borg's testimony (or other admissible evidence) at the evidentiary hearing, the Court is unable to determine if a search warrant – and particularly a search warrant for firearms – would have been requested had the firearms not been seized from Defendant's house.

The Court is also unable to determine if the search warrant would have been issued without the statements related to the firearms in Affidavit. Put differently, if the firearms had not been seized, Sgt. Borg would not have stated that firearms were seized, he would have had no reason to investigate Defendant's felony record, and he would not have had a way to determine if a firearm had been stolen.

Further, no evidence was presented to show how the prosecution was pursuing any alternative line of investigation. For that matter, had the guns not been seized, what further investigation would have been conducted?

The prosecution has failed in its burden to show inevitable discovery.

E. Statement made by Defendant to Harford and Sgt. Borg are fruit of the poisonous tree.

Defendant requested the suppression of statements he made during the course of this investigation. The motion is based on the Fourth Amendment and the Fruit of the Poisonous argument.

Defendant failed to clearly identify what statements he sought to suppress. As stated above, Exhibit B of Defendant's Memorandum in Support of Motion to Suppress Evidence and Statements, (Doc. 25), indicates that Sgt. Cory Borg interviewed Defendant on August 21, 2017.

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[8]Apparently, Sgt. Borg was referring to Deputy State Fire Marshall Harford.

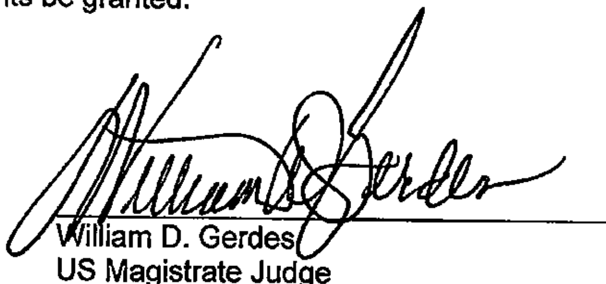
During the hearing, evidence was shown that Harford interviewed Defendant around Thanksgiving of 2017.

The prosecution presented practically no evidence at all related to the statements. Nothing presented to the Court can be used as the basis to prevent suppression as fruit of the poisonous tree. The statements were the result of the illegal seizure of the firearms.[9] The fire investigation turned into a criminal investigation. The guns were seized as part of the criminal investigation even without any belief that the guns were possessed illegally. The search warrant was obtained based upon the illegally seized evidence. Defendant was questioned after the search warrant was executed.

RECOMMENDATION

For the reasons stated above, this Court recommends that Defendant's Motion to Suppress Evidence and Statements be granted.

Dated June 25, 2018.



William D. Gerdes
US Magistrate Judge

NOTICE

Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the

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[9]The prosecution's repeated reference to "safe keeping" of the firearms is rejected because the house was secured and no other property was taken for "safe keeping". The house was secured and other people – including law enforcement and Defendant's mother were present at the home when the guns were removed. Further, why would only the firearms have to taken for safe keeping? Why were the other contents of the house not taken for safe keeping? Defendant's mother testified that she was the fire scene while Harford and Deputy Wik were there. If the concern was safe keeping, why were the guns not turned over to Defendant's mother?

magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review. Fed. R. Crim. P. 59.