IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
vs.	§	CRIM. NO. B-14-876-01
KEVIN LYNDEL MASSEY	§	

GOVERNMENT'S SUPPLEMENTARY RESPONSE TO MOTION TO SUPPRESS AND MOTION TO DISMISS INDICTMENT

SUPPRESSION OF EVIDENCE

Defendant seeks suppression of evidence obtained on August 29, 2014 asserting the evidence was obtained without a warrant and in violation of the Fourth, Fifth and Sixth Amendments. Defendant's arguments fail because: (i) Defendant was observed carrying a rifle and that observation was made prior to any alleged search or stop; (ii) Defendant was asked for his identification by law enforcement in the course of investigating a shooting involving a federal agent; (iii) Defendant was detained after the shooting occurred as potential witnesses; (iv) Defendant's firearms were seized to protect both law enforcement and civilian witnesses; and, (v) Defendant's possession of two firearms was in violation of both state and federal law.

The evidence obtained by law enforcement on August 29, 2014 was lawfully obtained without the need of a warrant. Border Patrol Agent Danny Cantu observed defendant carrying a 7.62x39mm rifle. The observation of the defendant was not the result of a search or a stop. The defendant was observed by law enforcement carrying a large rifle in plain view on private property that was open to the public. There are no constitutional safeguards triggered by the initial observation of Agent Cantu.

After gunshots were heard and before going to the scene of the shooting, Cantu requested identification from Defendant. Defendant provided his Texas Driver License to Cantu. A police officer is free to ask a person for identification without implicating the Fourth Amendment. *Hibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177,185 (2004). "Interrogation relating to one's identity or a request for identification by the police does not, by itself constitute a Fourth Amendment seizure." *INS v. Delgado*, 466 U.S. 210,216 (1984). Therefore, Cantu's request and receipt of Defendant's identification was not in violation of the Fourth Amendment.

Cantu went to the scene of the shooting, disarmed Foerster, spoke to eye witnesses of the shooting, and then returned to the location of Defendant. Cantu was carrying Foerster's firearm when he returned to Defendant. Cantu knew shots had been fired but did not know if the Border Patrol Agent who fired the shots had been threatened by Foerster, had made a mistake or had committed a crime against Foerster. Defendant, Foerster and Varner boarded the Kawasaki motor vehicle and traveled a short distance to an open field. Defendant asked if they could leave. Cantu told him they needed to follow him to the staging area approximately 260 yards away. It was proper for Cantu to request Defendant and the other occupants of his vehicle to remain. See *United States v. Bolden*, 508 F.3d 204,206 (5th Cir. 2007); upholding the stop of a vehicle at gun point that may contain witnesses, participants or victims of a crime.

Once all parties were at the staging area, Cantu secured the long firearms in his patrol vehicle for officer safety. Defendant agreed to this and voluntarily removed a handgun that was carried in his waistband before placing the weapon in Cantu's vehicle. It was reasonable for BPA Cantu to request that Defendant and his companions disarm pending investigation into the events that precipitated the shooting. "If an officer develops-----and is able to articulate-----

reasonable grounds to believe that a suspect is armed and presently dangerous to the officer, third parties, or himself, the officer may "take swift measures to discover the true facts and neutralize the threat of harm if it materialized." *United States v. Sanders*, 994 F.2d 200,203 (5th Cir.1993) (quoting *Terry*, 392 U.S. at 30). To determine if an investigative detention is reasonable common sense and ordinary human experience must govern over rigid criteria. *U.S. v. Sharpe*, 470 U.S. 675,685 (1985). Cantu was in a situation where the weapons could not be secured in the vehicle operated by Defendant because it was without doors. Additionally, Foerster was angry and wanting to fight the agent who had fired upon him. Cantu secured the weapons for safety reasons knowing that additional officers would be arriving and with the intent of preventing an encounter between armed civilians and the arriving law enforcement. Cantu observed and noted who was carrying the various weapons.

Cameron County Deputy Sheriff Sgt. Valerio arrived at the staging area at 4:19 P.M. Cantu briefed Valerio on what happened and provided him with Defendant's identification. Valerio requested a criminal history report on Defendant and learned that he and Foerster had felony convictions. Valerio was concerned about returning the weapons because of the felon status of Defendant and Foerster. Valerio was instructed by his supervisor to keep the weapons pending further investigation which he did. Defendant's weapon possession was in violation of Texas Penal Code § 46.04.

> Texas Penal Code § 46.04 Unlawful Possession of Firearm
>
> (a) A person who has been convicted of a felony commits an offense if he possess a firearm:
>
> (1) After conviction and before the fifth anniversary of the persons release from confinement following conviction of the felony or the

> person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
>
> (2) After the period described by Subdivision (1), at any location other than the premises at which the person lives.

T.P.C. § 46.04 prohibits felons from possessing firearms anywhere for five years after their release from confinement. "When five years have passed a felon may possess a weapon only within the confines of his or her residence." *State v. Mason* 980 S.W. 2d 635,639 (Tex. Crim. App. 1998). All felons are prohibited from possessing firearms at any time at all places away from their residence, no matter how much time has passed from the date of their release from confinement or supervision. *Id.* at 639. It was abundantly clear to Valerio that Defendant did not live in the brush or agricultural fields near the staging area and he was without choice in keeping the firearms belonging to Defendant. The firearms were properly seized.

Federal Bureau of Investigations Agent David Cordova interviewed Defendant. The interview lasted about 30 minutes and Defendant left soon after the interview concluded. The interview began shortly after 6:00 P.M. Cordova was not aware Defendant was a felon and was questioning him as a witness to the shots fired by the Border Patrol Agent. The questioning of Defendant was not accusatory. Defendant was at the staging area for approximately three hours. While in this area he was free to move about from his vehicle to a shady area near the road. Defendant was never handcuffed, patted down, threatened with a weapon or treated in a way that would indicate he was arrested. The Defendant never relinquished the keys to his motor vehicle. The interview with Cordova took place in an open area along a dirt road. Custody for *Miranda* purposes requires a greater restraint on freedom than seizure under the fourth amendment. *United States v. Cavazos*, 668 F.3d 190,193 (5th Cir. 2012). "A suspect is … 'in custody' for *Miranda*

purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest. *United States v. Begivanga,* 845 F.2d 593, 596 (5th Cir. 1988).

It should be noted for the Court that Defendant is charged in two counts of the four count indictment for violations of § 922(g)(1) arising out of Defendant's arrest and a subsequent search of Defendant's hotel room on October 20, 2014. The arrest of Defendant on October 20, 2014 was pursuant to an arrest warrant and a firearm was in Defendant's possession found on his person. The search of Defendant's hotel room on October 20, 2014 was pursuant to a search warrant and a firearm was found inside Defendant's hotel room. The warrants issued after a finding of probable cause by a neutral magistrate. Anthony M. Rotunno, an agent with the Bureau of Alcohol, Tobacco and Firearms, was not present and did not participate in the investigation on August 29, 2014. Agent Rotunno served the arrest warrant as well as the search warrant, discovering two more weapons in Defendant's possession. This was objectively reasonable and was based in reliance on the magistrate's probable cause determination. As such, the findings made in this case based on the warrant should not be suppressed. See *U.S. v. Leon*, 468 U.S. 897 (1984).

MOTION TO DISMISS INDICTMENT

Defendant seeks dismissal of the indictment by challenging the constitutionality of Title 18 United States Code § 922(g)(1). Defendant argues that Title 18 U.S.C. § 922(g)(1) is barred by the Second Amendment, an unconstitutional exercise of Congress's Commerce power and violates equal protection rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. Defendant's arguments are without merit.

Defendant relies on *District of Columbia v. Heller*, 554 U.S. 570 (2008) for the proposition that felons are permitted to carry weapons. *Heller* explicitly endorses long standing prohibitions of felons and firearms holding, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller* at 626-627. Pursuant to *United States v. Daugherty*, 264 F 3.d 513, 517-18 (5th Cir. 2001), Massey is still a convicted felon and is prohibited from possessing a firearm. The Fifth Circuit recently stated in *United States v.Rodriguez*, 590 F. App'x. 430 (5th Cir. 2015) (unpublished), that *Daugherty's* holding was not undermined by *Heller*.

Defendant's Commerce Clause arguments are also foreclosed by *United States v. Daugherty*. In *Daughtery*, the court upheld a conviction involving a weapon that traveled in interstate commerce and rejected the argument there was an insufficient nexus to interstate commerce. *Daugherty* at 518.

In *United States v. Darrington*, 351 F. 3d 632, (5th Cir 2003) the court endorsed the holding in *Daugherty* concerning the Commerce Clause and rejected the argument that Title 18 § 922(g)(1) amounts to an Equal Protection violation because it depends on varying state law regimes for defining criminal conduct and for the restoration of the right to bear arms. *Darrington* at 634-635.

Finally, all arguments offered in Defendant's *Motion to Dismiss* were soundly rejected by the 5th Circuit Court of Appeals in *United States v. Everist*. 368 F.3d 517 (5th Cir. 2004). In *Everist*, petitioner challenged the constitutionality of §922(g)(1) arguing that the statute violated the Second Amendment, the Tenth Amendment, and the Equal Protection Clause of the

Fourteenth Amendment. The Court held that "[i]rrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." *Id.* at 519. Moreover, the Court went on to state that "§ 922(g)(1) represents a limited and narrowly tailored exception to the freedom to possess firearms, reasonable in its purpose and consistent with the right to bear arms protected under the Second Amendment." *Id.* Petitioner's other arguments in *Everist*, namely that Petitioner's challenge to § 922(g)(1) based on the Tenth Amendment and the Equal Protection Clause of the Fourteenth Amendment were "meritless" based on the Court's prior holding in *United States v. Daugherty* *Id*. at 19, also see Footnote 3.

Conclusion

Defendant was observed by law enforcement carrying a rifle prior to any investigation or alleged detention. Defendant was asked to identify himself because Defendant was identified as a witness in the investigation of a shooting involving a federal agent. The weapons in Defendant's possession were seized from him during this investigation for the safety of law enforcement and for the safety of civilians at the scene. Defendant was questioned thereafter in a non-custodial setting and was free to leave. Defendant's weapons were held by law enforcement once it became clear he was a convicted felon and had been in possession of those weapons in violation of both state and federal law. None of the foregoing facts support Defendant's claim for suppression of evidence. Moreover, the Fifth Circuit and the Supreme Court have repeatedly upheld the constitutionality of Title 18 USC § 922(g)(1).

WHERFORE: For the above reasons the Government requests the Defendants Motion to Suppress and Motion to Dismiss Indictment be denied.

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

By: ***s/ William Hagen***
WILLIAM HAGEN
Assistant U.S. Attorney
Fed. Bar No. 28261
Texas Bar No. 08688600
600 E. Harrison St, #201
Brownsville, TX 78520
Tel: (956) 548-2554 / Fax: (956) 548-2711

CERTIFICATE OF SERVICE

I, hereby certify that on the 10th day of April, 2015, a copy of the Government's response was electronically sent to Louis S. Sorola, Attorney for defendant.

s/ William Hagen
WILLIAM HAGEN
Assistant U.S. Attorney