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SIMON JASPER McCARTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	Cr. NO. 08-00513HG
)	
Plaintiff,)	DEFENDANT’S POST-HEARING
)	BRIEF IN SUPPORT OF
vs.)	MOTION TO SUPPRESS ALL
)	PHYSICAL EVIDENCE;
SIMON JASPER McCARTY,)	CERTIFICATE OF SERVICE
)	
Defendant.)	
_____)	

DEFENDANT'S POST-HEARING BRIEF IN SUPPORT OF MOTION TO SUPPRESS ALL PHYSICAL EVIDENCE

Mr. Simon Jasper McCarty, through his undersigned counsel and pursuant to the Fourth Amendment of the United States Constitution, respectfully requests that this Honorable Court suppress all evidence obtained as the result of the unlawful search and seizure of his person and belongings which exceeded the scope of 49

U.S.C. §. 44902(a) and *Title 49 of the Code of Federal Regulations*. Mr. McCarty requests that all physical evidence obtained, as well as all evidence discovered as a result of the unlawful search and seizure be suppressed.

I. LEGAL ANALYSIS

The Fourth Amendment requires the government to respect “[t]he right of the people to be secure in their persons ... and effects, against unreasonable searches and seizures.” *U.S. Const. Amend. IV*. Warrantless searches and seizures “are per se unreasonable ... subject only to a few specifically established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967).

A seizure exists when a reasonable person in the defendant's position would not feel free to leave. *United States v. Jones*, 973 F.2d 928 (D.C. Cir.), *vacated in part*, 980 F.2d 746 (1992), and *cert. denied*, 114 S. Ct. 741 (1994); *California v. Hodari*, 111 S.Ct. 1547, 1552 (1991).

A person is, therefore, seized if s/he is restrained in some manner, either by physical force or submission to a show of authority. *Terry v. Ohio*, 88 S.Ct. 1868, 1879 n. 16; *United States v. Wood*, 981 F.2d 536, 538 (D.C. Cir. 1992); *Hodari*, at 1551.

“Airport screenings of passengers and their baggage constitute administrative searches and are subject to the limitations of the Fourth Amendment. *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973) (noting that

airport screenings are considered to be administrative searches because they are “conducted as part of a general regulatory scheme” where the essential administrative purpose is “to prevent the carrying of weapons or explosives aboard aircraft”); See *also Id.* at 895, 904. Thus, airport screenings must be reasonable. See *Torbet v. United Airlines, Inc.*, 298 F.3d 1087, 1089 (9th Cir. 2002). To judge reasonableness, it is necessary to balance the right to be free of intrusion with “society's interest in safe air travel.” *United States v. Pulido-Baquerizo*, 800 F.2d 899, 901 (9th Cir. 1986).” *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005)

“Significantly, the Supreme Court has held that the constitutionality of administrative searches is not dependent upon consent. In *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), the Supreme Court upheld the warrantless search of a pawn shop owner's gun storeroom. The search was authorized by a federal gun control statute. The Court held that, “[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.” *U.S. v. Aukai*, 497 F.3d 955, 959-960 (9th Cir. 2007).

“Although the constitutionality of airport screening searches is not dependent on consent, the scope of such searches is not limitless. A particular airport security screening search is constitutionally reasonable provided that it ‘is

no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives ... [and] that it is confined in good faith to that purpose.’ ” *U.S. v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007). To make a lawful arrest--the quintessential seizure of the person under our Fourth Amendment jurisprudence-- police must have probable cause to believe that a person has committed or is committing an offense. See *Beck v. Ohio*, 379 U.S. 89, 91 (1964). To conduct an investigative detention, the police need reasonable, articulable suspicion. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Pursuant to 49 U.S.C. Sec. 44902(a); “Mandatory Refusal.-- The Under Secretary of Transportation for Security shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport-- (1) a passenger who does not consent to a search under *section 44901 (a)* of this title establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance; or (2) property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.”

“The general balancing test for reasonableness grows out of an exception to the accepted Fourth Amendment standard for administrative searches. The Supreme Court recognized this exception for situations where a governmental

search was incompatible with traditional probable cause concepts requiring individualized suspicion. See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 536-38, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). For example, the Supreme Court, in *Camara v. Municipal Court of San Francisco*, held that area inspections seeking to enforce promulgated housing codes are reasonable despite lacking traditional individualized suspicion. *Id.* at 538-39, 87 S.Ct. 1727. The Supreme Court recognized that individualized suspicion would be impracticable and stated that ‘there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.’ *Id.* at 536-37, 87 S.Ct. 1727. On one side of the balance the Court weighed the governmental interest in conducting the housing code inspections. See *Id.* at 535, 87 S.Ct. 1727. On the other side, the Court looked to the intrusion that resulted from such a search. See *Id.* at 538-39, 87 S.Ct. 1727. The Supreme Court weighed this balance in favor of the administrative search while stressing the importance of the administrative regulations that limited the discretion of the governmental official. See *Id.* at 538, 87 S.Ct. 1727. In such cases, the administrative regulations stand in the place of probable cause. *Id.* Initially, as in *Camara*, warrants were required for these administrative searches unless some exigency was present. See, e.g., *Id.* at 539-40, 87 S.Ct. 1727. Over time, however, the Court began dispensing with the warrant requirement in situations where obtaining a warrant could inhibit

the inspections, again relying on the existence of sufficiently defined regulations to provide an adequate substitute for the particularity requirements of a warrant. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 602-03, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (upholding warrantless inspections required by the Mine Safety and Health Act); *United States v. Biswell*, 406 U.S. 311, 317, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (upholding warrantless inspections required by the Gun Control Act of 1968).” *U.S. v. Stewart*, 468 F.Supp.2d 261, 266-267 (D. Mass. 2007).

“In addition to the need for discretion-limiting regulations, the Supreme Court has also required that the primary purpose of such searches to be something other than general crime control. See *City of Indianapolis v. Edmond*,² 531 U.S. 32, 47-48, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (holding a police checkpoint to interdict narcotic traffic invalid because the principal purpose of the checkpoint was to detect evidence of criminal wrongdoing).” *U.S. v. Stewart*,² 468 F.Supp.2d 261, 267 (D. Mass. 2007)

49 U.S.C. Sec. 44902(a) only mandates a search for dangerous weapons, explosives, or other destructive substances. The language of *49 U.S.C. Sec. 44901* and *44902* is void of any reference for additional searches for items such as photographs whether explicit or not, newspaper articles regardless of subject matter, newspaper advertisements regardless of models used or merchandise advertised, or personal handwritten notes. Likewise, the regulations relied on by

TSA in this case, are generally found at *49 C.F.R. 1540*. Those regulations clearly prohibit the carriage of weapons, explosives and incendiaries. See *49 C.F.R. 1540.111*. However the entire text of *49 C.F.R. 1540* is void of any reference for additional searches for items such as photographs, newspaper articles, advertisements, and handwritten notes.

All of the witnesses from TSA who offered testimony at the Suppression Hearing conducted on May 10, 2009 referred to protocols or Standard Operating Procedures or SOPs. The Regulations very briefly refer to “Procedures” without providing any guidance for how those procedures are created or implemented. *49 C.F.R. 1540.107* states; “No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter.” As stated previously the subchapter being referenced, *49 C.F.R. 1540* is completely void of any reference to the procedures utilized on a daily basis by TSA officials at our Nation's airports.

II. EVIDENCE ADDUCED AT THE SUPPRESSION HEARING

There appears to be much confusion regarding the nature of the photographs first observed by TSA Officer Dorinda Andrade and whether or not these photographs were viewed before or after a permissible administrative search.

When TSA Officer Andrade conducted a search of the Defendant’s bag

containing his laptop computer she initially stated that as she unzipped the bag to check the laptop “*some pictures I guess fell onto the table*” nevertheless she continued her search of the laptop. (9/10/09 Tr. at 22:8-10)¹. Clearly, Officer Andrade’s statement implies that at first glance there was nothing about the photographs that would suggest any reason for concern or for further inspection necessitating diversion from the laptop computer. On cross examination Officer Andrade was asked at what point did she decide there was something wrong regarding the photographs: “when you first saw the photographs or after you started reading the letters and that sort of stuff? (9/10/09 Tr. at 76:23-25; 77:1-2). To this question she responded “*[e]verything combined together.*” When pressed, Officer Andrade admitted that she only realized that something was wrong after she had seen the contents of the envelope as well as reviewed all the items on the table, which included the writings. (9/10/09 Tr. at 77:4-8).

Officer Andrade at one point stated that the pictures “*were all on the table*” and also stated that newspaper clippings and notes were included in the items that had fallen out and that she had read the notes. (9/10/09 Tr. at 23:14-20). However she later contradicted that earlier statement when she admitted that there were more photographs left “*in the envelope*” than on the table (9/10/09 Tr. at 68:12). Further that her and her daughter TSA Officer Jenny Moniz examined the contents

¹ Transcript of Motion to Suppress hearing held on September 10, 2009.

of the envelope *after* they inspected the photographs on the table. (9/10/09 Tr. at 67:5). The clear indication is that there was nothing that would prompt the TSA Officers to continue their search beyond the scope of a permissible administrative search in this case *until after* Officers Andrade and Moniz reviewed all the photographs and read the notes. This is confirmed by Officer Andrade's testimony that she had already inspected and cleared the laptop before looking through the photographs and other personal items. When pressed in court as to which photographs she saw first before touching any of the photographs that were on the table, she could not identify which photos she saw first stating that she "*can't precisely say.*" (9/10/09 Tr. at 60:18) The fact is if Officer Andrade saw pictures 7 and 10 first, there would be no probable cause to inspect further as these photographs did not appear to the court to be child pornography.²

Finally, Officer Andrade even admits that viewing the photographs alone was insufficient for her to conclude that something was amiss. She stated she "*needed to see more than what I saw before calling my lead*"³ (9/10/09 Tr. at 62:5-6). Officer Andrade admits that when she decided to read the written material she did so because she was trying to "*determine what the pictures were all about*" and that it was no longer about airline safety, but "*all about the pictures.*" (9/10/09 Tr.

² The court indicated at the conclusion of the further suppression hearing that photographic exhibits 7 and 10 did not appear to the court to be pornography.

³ A "lead" is a supervisory TSA Officer (9/10/09 Tr. at 70:19-21).

at 81:17-22).

III. DISCUSSION

TSA employees operate under the authority of *49 U.S.C. Sec. 44901, 44902* and *8 C.F.R. 1540 et. seq.* These laws and regulations give TSA Officers the right to inspect persons and their property prior to their boarding of an aircraft. The Government's memorandum in opposition to Defendant's motion and the offered testimony of the TSA officers and officials appear to suggest that TSA search procedures can progress beyond the language of the statute, i.e., limiting a search to dangerous weapons, explosives, or other destructive substances. See *49 U.S.C. 44902(a)*. In stark contrast to the government's assertion, TSA in *United States v. Marquez*, 410 F.3d 612 (9th Cir. 2005), offered a completely different interpretation of the parameters of a "screening."

"Airport screening procedures are conducted for two primary reasons: first, to prevent passengers from carrying weapons or explosives onto the aircraft; and second, to deter passengers from even attempting to do so. See *Davis*, 482 F.2d at 908. In their briefs and at oral argument, neither party suggested that there was any purpose or goal in the instant search other than to detect weapons or explosives. TSA screener Petersen stated that he was trained to look for "anything that would bring a plane down" and that the search of Marquez was in accordance with this goal. He further testified repeatedly that he was not trained, nor told, to search for anything other than weapons or explosives, and he said explicitly that he was not trained to look for drugs: 'Our job is to make the passengers in the airplanes safe, and we don't look for drugs.'

Marquez, 410 F.3d at 617.

The TSA officer on duty in *Marquez* apparently was unaware of a

requirement or suggestion that he may look for and peruse items such as photographs, newspaper ads, and handwritten notes about children in the dispensing of his duties.

The transportation regulations *only* prohibit weapons, explosives and incendiaries. See *49 C.F.R. 1540.111*. The regulations do not prohibit newspaper articles and ads, photographs, envelopes, or a multitude of other personal items that might be carried on a passenger's person or in their luggage.

The Defendant, Simon Jasper McCarty was completely cleared of any suspicion that he possessed dangerous weapons, explosives, or other destructive substances. Officer Andrade indicated that her primary purpose was to clear a laptop computer and a dense item that signaled an alarm. After reaching that conclusion, TSA Officer Andrade chose to thumb through photos enclosed in an envelope and read private notes and articles found with the laptop. TSA Officers are trained to look for anomalies. Each TSA X-ray operator sees hundreds of laptops a day and some like Officer Andrade have been doing this for almost eight years. They know what laptops are supposed to look like and can distinguish what a laptop looks like through the scanner versus envelopes, photographs, or documents. Moreover the computer scanning equipment utilized by the TSA Officer Andrade was sophisticated enough to visually dissect or “slice” the laptop into sections to view its interior. (9/10/09 Tr. at 44:1-16). It is clear that Mr.

McCarty's laptop was not a danger to the safety of the aircraft and that the photographs and newspaper clippings were clear of explosives. Moreover, under the facts and circumstances of this case it would be disingenuous for TSA to argue that the photographs were truly inspected only for the presence of "sheet explosives" when the TSA Officer testified otherwise. She indicated her main concern was to "*determine what the pictures were all about*" and that it was no longer about airline safety, but "*all about the pictures.*" (9/10/09 Tr. at 81:17-22).

The testimony of TSA Officer Andrade is riddled with inconsistency relative to when and how she discovered there was something wrong with the photographs found during the inspection of Defendant's luggage. TSA Officer Andrade was not able to direct the Court to the exact protocols of searching a laptop computer discovered in a bag, necessitating the search of the defendant's envelope, photographs, notes, and articles. Regardless, the evidence before the Court demonstrates that the search of the Defendant's personal effects and the discovery of the photographs, articles, (and external hard drive in the checked luggage following Defendant's detention) occurred after TSA had determined that the Defendant did not possess the prohibited items referred to in *49 C.F.R. 1540.111* and *49 U.S.C. 44902(a)*.

It is the Government's burden to establish that the administrative search of the Defendant was conducted under the authority of a valid statute and pursuant to

a regulatory scheme that limits the discretion of the Government Official. TSA Officer Andrade's search of the Defendant's bag proceeded beyond the scope of *49 C.F.R. 1540.111* and *49 U.S.C. 44902(a)*.

Certainly, TSA maintained and utilized significant technological means to determine that the Defendant did not possess any of the prohibited items proscribed by statute and regulations. In the absence of a specific protocols or directives created under the authority of *49 U.S.C. 44901* or *8 C.F.R. 1540*, the search of the Defendant's private property appears to have been nothing more than a generalized search on the part of a curious TSA Officer. The TSA Officer's curiosity was fueled by one or more photographs of children which ultimately led her to open an envelope containing additional photographs and extract the contents for further viewing. The TSA Officer who read articles and notes, and opened the Defendant's envelope to view more photographs, articles, and notes was no longer conducting a search in compliance with *49 C.F.R. 1540.111* and *49 U.S.C. 44902(a)* but was exercising discretion that is unsupported by the evidentiary record before this Court.

IV. CONCLUSION

TSA Officer Andrade who searched Defendant's personal effects, exceeded the authority granted her by *49 C.F.R. 1540.111* and *49 U.S.C. 44902(a)*. In doing so she violated Defendant's constitutional right of privacy. Accordingly, Defendant

respectfully requests that his motion to suppress be granted and that any and all physical evidence discovered as the result of TSA's unlawful administrative search and seizure be suppressed, including but not limited to, all evidence recovered as a direct result of and stemming from the discovery of photographs of children, handwritten notes, newspaper advertisements, newspaper articles, and computer equipment.

DATED at Honolulu, Hawaii, November 3, 2009.

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