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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Criminal No. 04-85-E-BLW
	)	
PEDRO DUENAS-RIVERA, aka JOSE DIAZ	)	RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS
	)	
Defendant.	)	
	)	

NOW COMES, Michael J. Fica, Assistant United States Attorney for the District of Idaho and representing the United States herein, and in response to defendant's motion to suppress states as follows:

On October 21, 2003, Detective Chris Elverud, of the Idaho State Police, received information that a Hispanic male named "Jose" was selling methamphetamine from an apartment at 350 E Street, Apartment 303, Idaho Falls, Idaho. Detective Elverud conducted surveillance on the residence. At approximately 7:00 a.m., the next morning Detective Elverud along with Sergeant Steve Davis and Trooper Vance Cox, all with the Idaho State Police, knocked on the front door of the apartment in an attempt to contact the occupant or occupants. All three officers were in street clothing, but were wearing ISP windbreakers. Trooper Cox was present because he was fluent in the Spanish language.

The Defendant answered the door, and Trooper Cox asked him if he spoke English, to which he said he didn't. From this point, on Trooper Cox's entire conversation with the defendant was in Spanish. Trooper Cox then asked the Defendant if his name was Jose and he said it was. Trooper Cox then told the defendant that they were there because they had received information about drugs at the residence. Trooper Cox then asked if the officers could come in to search the residence. Before agreeing to let the officers enter, the defendant asked about paper that Trooper Cox was holding. Trooper Cox told the defendant that it was a permission-to-search form. The defendant specifically asked if the paper was a search warrant, to which Trooper Cox replied that the paper was not a search warrant, and that the officers did not have a search warrant.

The Defendant then invited the officers into the living room/kitchen area, and sat at a table. Trooper Cox then handed the permission-to-search form to the Defendant and asked him to read it. The Defendant, who was wearing glasses, then spent several minutes reading the form, and then signed the form. Trooper Cox then asked the defendant if he understood the form, to which the defendant nodded his head. Trooper Cox then repeated, "I need to know if you understood what you just read and signed?" and the Defendant answered "yes". Upon which, Sergeant Davis and Detective Elverud began a search of the premises while Trooper Cox sat and talked with the Defendant.

ARGUMENT

As a preliminary matter, the Fourth Amendment protects "people, not places." *See Katz v. United States*, 389 U.S. 347, 351 (1967). Thus the Defendant must first demonstrate that he personally had a "legitimate expectation of privacy" in the place searched or the thing seized, or his motion fails on its face. *See Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Absent an initial showing that the Defendant had a reasonable expectation of privacy in the apartment, he cannot challenge the search therein.

Furthermore, a valid search may be made without a warrant and without probable cause if the person in control of the premises has given voluntary consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Police officers do not need to have reasonable suspicion to initiate a voluntary encounter with a suspect as long as the prosecution can establish that such an encounter is based on consent. *See Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Bostick*, 501 U.S. 429 (1991). Furthermore, failing to advise a person that he may refuse consent, does not necessarily make consent involuntary. *See Ohio v. Robinette*, 519 U.S. 33 (1996). The determination of whether consent was valid is a fact-specific inquiry that must be determined by the totality of the circumstances. *See Schneckloth*, 412 U.S. at 226; *Ohio v. Robinette*, 519 U.S. 33 (1996); *United States v. Mendenhall*, 446 U.S. 544 (1980). In conducting such an inquiry, the following factors may be considered: the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of the intrusion; and the use of coercive or punishing conduct by the police. *See Schneckloth*, 412 U.S. at 226, 248.

In the present case, contrary to assertion of the Defendant in his motion, the police did not "force their way into the apartment." The encounter on the doorstep was, in fact, a consensual one. The officers told the Defendant they had received information about drugs, and asked for permission to come into the apartment. The Defendant was sufficiently aware of his rights to the extent that, even before allowing the officers to enter the apartment, he inquired whether the officers had a warrant. To this inquiry, the officers unequivocally told the Defendant they did not, but that the form they had was a request for permission to search the apartment that they wanted the defendant to review.

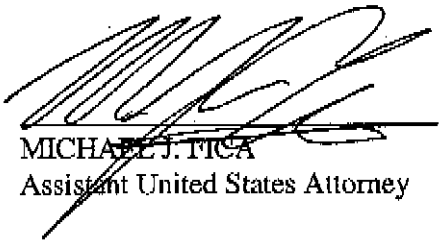
At that point the Defendant gestured the officers into the apartment, and only upon the Defendant granting entry to the officers did they enter the apartment. Immediately upon entry, Trooper Cox sat at a table with the Defendant and presented the Defendant with the form requesting permission to search the premises. The Defendant, wearing his glasses, reviewed the document for several minutes before signing it. Trooper Cox then, out of an abundance of caution, asked the Defendant if he was sure he understood the form, to which the Defendant twice replied in the affirmative. Only then did the officers began a search of the apartment.

It was well after this, even after the drugs and paraphernalia were found, that the Defendant was advised he was under arrest, and read his *Miranda* warnings. At no time prior to or during the review or signing of the permission to search form was the Defendant in custody in any way.

Accordingly, the government respectfully requests that the Defendant's motion to suppress be DENIED.

Respectfully submitted this 8th day of October, 2004.

THOMAS E. MOSS
UNITED STATES ATTORNEY



MICHAEL J. TICA
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office for the District of Idaho, and that a copy of the foregoing RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS, was mailed, postage prepaid to all parties named below, this 8th day of October 2004.

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