

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION NO. 00-682
 :
 DENNIS ATIYEH AND JOSEPH ATIYEH :

MEMORANDUM

Padova, J. January , 2000

Before the Court are two Motions to Suppress filed by Defendants Dennis and Joseph Atiyeh. The motions have been fully briefed and are ripe for decision. A hearing was held on January 18, 2001. For the following reasons, the Court denies both Motions.

I. INDICTMENT

The Indictment alleges that Defendants Dennis and Joseph Atiyeh illegally operated a sports betting business called English Sports Betting (a/k/a English Sports Information Processors and English Sports) (“ESB”) from Lehigh County, Pennsylvania, and from Montego Bay, Jamaica, between November 10, 1995 and May, 1996. To aid in marketing and promoting ESB’s services, Defendant Dennis Atiyeh operated two other businesses: Sports Marketing and Sales (“Sports Marketing”) and Las Vegas Sports News (“Sports News”). Sports News was a newspaper that provided information to ESB customers; Sports Marketing provided marketing services for ESB. Both Sports Marketing and Sports News were based at 881 Third Street, Whitehall, Pennsylvania (“881 Third Street”). 881 Third Street was also used to conduct business for ESB.

Dennis Atiyeh allegedly also used two other companies to receive bets placed illegally with ESB. One of these companies was Sports Connection, a sports apparel business located in Emmaus, Pennsylvania. Between November 10, 1995 and January 1996, Sports Connection allegedly received funds from ESB customers to open accounts and gamble with ESB. Between November, 1995, and May, 1996, Worldwide Financial Processors (a/k/a Worldwide Financial Services) (“Worldwide”), based in Baton Rouge, Louisiana, also collected funds from ESB customers to open accounts and place bets. Defendant Joseph Atiyeh was President of Worldwide at all relevant times.

According to the Indictment, Dennis Atiyeh operated his illegal business as follows. Individuals would call 881 Third Street to obtain information about opening a wagering account with ESB and the procedure for forwarding money for bets to ESB. Dennis Atiyeh would also distribute betting cards, called parlay cards, by fax and make payouts on bets made with ESB from 881 Third Street. Customers placing bets with ESB would remit money through Western Union to Sports Connection and Worldwide. Sports Connection would transfer the funds received by wire or bank check to ESB and Defendant Dennis Atiyeh. Worldwide would transfer the funds by wire or bank check to ESB in Jamaica. Funds received by ESB allegedly were used to fund the operations of Sports Marketing, Sports News, and ESB.

In addition to seeking forfeiture, the Indictment states sixteen counts. Dennis Atiyeh is charged with operating an illegal gambling business in violation of 18 U.S.C. § 1955 (Count I); money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts III and IV); and money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) (Counts V - XII). Both Dennis and Joseph Atiyeh are charged with conspiracy to engage in money laundering in violation of 18 U.S.C. § 1956(h) (Count II) and money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) (Counts XIII-

XVI).

II. MOTION TO SUPPRESS EVIDENCE FROM SEARCHES CONDUCTED IN WHITEHALL TOWNSHIP AND BATON ROUGE, LOUISIANA

Defendants first seek to suppress all evidence found during searches conducted on May 3, 1996, of 881 Third Street, Suite A-7, Whitehall Township, Pennsylvania¹; 855 Third Street, Whitehall Township, Pennsylvania² (“855 Third Street”); and 5702 Vicksburg Drive, Baton Rouge, Louisiana³ (“5702 Vicksburg Drive”). Defendants assert that the affidavit submitted in support of the warrant failed to establish probable cause for the searches because it misled the issuing magistrate by omitting critical facts in reckless disregard of the truth.

At the threshold, the Government challenges Joseph Atiyeh’s standing to contest any of the searches conducted in Pennsylvania or Louisiana, and Dennis Atiyeh’s standing to challenge the search of 5702 Vicksburg Drive. At the suppression hearing, both Defendants conceded that they lack standing to challenge the search 5702 Vicksburg Drive. Joseph Atiyeh further conceded that he lacks standing to challenge the search of the 855 Third Street property. Joseph Atiyeh, however, argues that he has a reasonable expectation of privacy in the 881 Third Street locale based on the Indictment’s allegations of his participation in a conspiracy to conduct an illegal gambling business operating out of that location.

A defendant may urge suppression of evidence obtained in violation of the Fourth

¹881 Third Street is alleged to be the site of the illegal gambling business.

²855 Third Street is alleged to be Dennis Atiyeh’s residence.

³5702 Vicksburg Drive is the residence of Margaret and Joseph Hirezi and the alleged base of Worldwide’s operations.

Amendment only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure. United States v. Padilla, 508 U.S. 77, 81 (1993). The challenging defendant bears the burden of establishing that he possessed a reasonable expectation of privacy in the area searched or the items seized. Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978); United States v. Baker, 221 F.3d 438, 441 (3d Cir. 2000). The United States Supreme Court has rejected the concept of a co-conspirator exception to the traditional rule of standing. See Padilla, 508 U.S. at 78. A co-conspirator can not obtain a reasonable expectation of privacy by virtue of his supervisory role in an alleged conspiracy. Id. Since he has articulated no other basis for standing save his alleged role in the conspiracy, the Court concludes that Joseph Atiyeh lacks standing to contest the search of either 881 or 855 Third Street. Accordingly, the Court will deny Joseph Atiyeh's motion in its entirety, and Dennis Atiyeh's motion with respect to 5702 Vicksburg Drive. Dennis Atiyeh, however, may contest the legality of the searches of 881 and 855 Third Street.

Magistrate Judge Rapoport approved warrants to search 881 Third Street and 855 Third Street based on the affidavit of Francis Bedics ("Agent Bedics"), a special agent with the criminal investigation division of the Internal Revenue Service. The affidavit asserts Agent Bedics' belief that an illegal gambling and money laundering operation was being conducted out of those locations and states facts in support of that theory. Defendant Dennis Atiyeh argues that the affidavit's allegations when corrected with the material that was recklessly omitted are insufficient to establish probable cause.

The Court will analyze Defendant's argument in three steps. First, the Court will determine whether the affidavit as stated establishes probable cause and, if it does not, whether the affiant and searching officers could have harbored an objectively reasonable belief in the existence of probable

cause. See United States v. Williams, 3 F.3d 69, 74 (3d Cir. 1993). If the Court concludes either that the affidavit does establish probable cause or that an officer could have had a reasonable belief that it did, then the inquiry turns to whether the affiant recklessly omitted the alleged relevant information. If the affiant did recklessly omit information, the Court will assess whether the affidavit as corrected by inclusion of the recklessly omitted facts would fail to establish probable cause.

District courts exercise only a deferential review of the initial probable cause determination made by the magistrate. Illinois v. Gates, 462 U.S. 213, 236 (1983); United States v. Conley, 4 F.3d 1200, 1205 (3rd Cir. 1993). Probable cause exists to support the issuance of a search warrant if, based on a totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997) (quoting Gates, 462 U.S. at 238). The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that a fair probability existed that evidence would be found. Id. Doubtful or marginal cases should be resolved in favor of the warrant. United States v. Ventresca, 380 U.S. 102, 109 (1965); Conley, 4 F.3d at 1205. The district court should focus on what information is actually contained in the affidavit, not on what information an affidavit does not include. Conley, 4 F.3d at 1208. The supporting affidavit must be read in its entirety and in a common sense and nontechnical manner. Gates, 462 U.S. at 230-31. Applying this standard, the Court concludes that the affidavit submitted to Magistrate Judge Rapoport alleges sufficient facts to establish probable cause that evidence of the operation of an illegal gambling business would be found at both 881 and 855 Third Street.

18 U.S.C. § 1955 prohibits individuals from conducting, financing, managing, supervising,

directing or owning of all or part of an illegal gambling business. 18 U.S.C.A. § 1955(b) (West 2000). The statute defines an illegal gambling business as a gambling business that:

- (i) is a violation of the law of the state in which it is conducted;
- (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
- (iii) has been or remains in substantially continuous operation for a period in excess of 30 days or has a gross revenue of \$2,000 in a single day.

18 U.S.C.A § 1955(b)(1) (West 2000). Pennsylvania law prohibits intentionally or knowingly distributing or manufacturing devices used for gambling purposes.⁴ 18 Pa. Cons. Stat. § 5513(a)(1) (2000). It is also unlawful under Pennsylvania law to occupy any location “for the purpose of receiving, recording or registering bets or wagers, or of selling pools,” to become the custodian of any property wagered, or own, lease, or occupy any premises used therefore. 18 Pa. Cons. Stat. § 5514 (2000).

The affidavit alleges that parlay cards, an item used to place bets on multiple sports teams and games, were distributed from 881 Third Street. The affidavit states that in September of 1995, Trooper Perruso of the Pennsylvania state police obtained information about a fax-on-demand wagering service offered by ESB.⁵ (Aff. ¶ 19.) This service enabled bettors to obtain and return

⁴18 Pa. Cons. Stat. § 5513(a) provides:

A person is guilty of a misdemeanor of the first degree if he:

- (1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards.

18 Pa. Cons. Stat. § 5513(a) (2000).

⁵Trooper Perruso initially called 1-800-TELEBET (“TELEBET line”), a number identified in a racing publication as providing information about establishing an account with ESB. (Aff. ¶¶ 8,

parlay cards by fax.⁶ (Id. ¶ 19.) Between September and November of 1995, Trooper Perruso and other police officers received parlay cards that bore a return fax number indicating that the cards were faxed from Sports Marketing at 737 Meadow Street in Allentown, Pennsylvania. (Id. ¶ 21.) By February, 1996, the return fax number on the cards received by police had changed to a line subscribed by Sports Marketing at 881 Third Street. (Id.) Furthermore, on February 16, 1996, police retrieved parlay cards from a trash dumpster at 881 Third Street. On April 9, 1996, the police again searched the trash at 881 Third Street and found an imprint of ESB parlay cards on a fax printing cartridge. (Id. ¶ 35.) These facts all provide probable cause to believe that gambling devices, namely parlay cards, were being received into and distributed from 881 Third Street in violation of 18 Pa. Cons. Stat. § 5513(a).

The affidavit also establishes that bets and wagers may have been recorded or registered at 881 Third Street. In October and November of 1995, police officers called the TELEBET line to open wagering accounts with ESB. (Id. ¶ 24.) On October 24, 1995, an officer allegedly was told by an ESB agent to send a money order to Jamaica, and send a copy of the money order by fax to 610-266-9253, the fax line at 881 Third Street. (Id. ¶ 24.) On October 16, 1995, the police searched the trash at 881 Third Street and retrieved faxed copies of money orders and money grams payable to ESB and/or Bernard McCormick, Director of English Sports (“McCormick”).⁷ (Id. ¶ 23.) On November 15, 1995, another officer was told to send money by Western Union to Sports Connection

19.) Calls made to the TELEBET line were forwarded to 881 Third Street. (Id. ¶20.)

⁶The fax number listed on the cards to which the cards were to be returned to ESB was not alleged to be associated with 881 Third Street or Sports Marketing.

⁷Previously in September 1995, an officer calling the TELEBET line was told to send money for wagering to ESB in the care of McCormick. (Id. ¶ 15.)

and then call the TELEBET line back with the money transfer control number. (Id. ¶25.) At the time, calls to the TELEBET line were being forwarded to 881 Third Street. (Id. ¶ 20.) The fact that ESB customers were instructed to send copies of money orders indicating how much they wagered to 881 Third Street, and evidence of the presence of such money order copies at 881 Third Street provides strong support for an inference that the bets were being recorded or registered at 881 Third Street in violation of 18 Pa. Cons. Stat. § 5514.

Other facts indicating that at least part of ESB's business was being managed from 881 Third Street are contained in the affidavit. On several occasions in October 1995 and February 1996, police found ESB wagering slips, ESB customer applications and account information, and wire transfer requests for credit to ESB in the trash at 881 Third Street. (Id. ¶¶ 22, 23, 35, 38.) During the course of the investigation, police obtained business cards for McCormick listing an Antigua address and the 881 Third Street fax line. (Id. ¶ 35.) Similarly, on April 2, 1996, the police received an advertising flyer from ESB regarding methods by which wagers could be placed that listed a return address in Antigua but bore a postmark from Lehigh Valley, Pennsylvania. (Id. ¶ 47.) These allegations indicate that ESB's offshore betting operations were entwined with activities occurring in Pennsylvania at 881 Third Street.

The lengthy timeline of the investigation alleged in the affidavit, from September 1995 to April 1996, establishes a fair probability that the allegedly illegal activities had been ongoing at 881 Third Street for longer than thirty days. Furthermore, the affidavit provides sufficient probable cause that the illegal gambling business reaped revenues in excess of \$ 2,000 in a single day. A confidential informant told police that the gambling business served between 1,200 and 1,500 customers and was capable of receiving up to \$ 200,000 daily. (Id. ¶ 7.) The affidavit fails to provide information about

the reliability of the informant, but the tip is supported by other information contained in the affidavit. The affidavit states that various individuals from all over the United States sent McCormick \$ 400,000 over an eleven month period in 1995. (Id. ¶18.) In addition, between October and November of 1995, individuals throughout the United States transferred approximately \$ 860,379.40 by wire to Sports Connection. (Id. ¶ 27.) These facts reasonably indicate a fair potential for the business to have revenues of at least \$2000 in a day. The affidavit, therefore, establishes probable cause with respect to the third element under section 1955.

The affidavit's allegations of the large number of telephone lines by Sports Marketing at 881 Third Street, and the involvement of at least three people in addition to Dennis and Joseph Atiyeh are sufficient to establish probable cause that the operation involves at least five people. The affidavit asserts that Sports Marketing subscribed to more than ten lines at the 881 Third Street address and received all calls made to the TELEBET line (Id. ¶¶ 10, 20.) The presence of at least one Sports Marketing employee, Mark Hovan, combined with the alleged involvement of Joseph Atiyeh as the recipient of funds wagered by ESB customers, Linda Atiyeh through her partnership in Sports Connection, and McCormick creates a fair probability with respect to the second element under section 1955. (Id. ¶¶ 15, 25, 30, 31, 33, 35, 39, 41.)

Based on all of the above, the Court concludes that the affidavit submitted to the magistrate judge establishes probable cause that evidence of the operation of an illegal gambling business operating in violation of 18 U.S.C. § 1955 may be found at 881 Third Street.

The affidavit also states allegations that link 855 Third Street to the operation of the alleged illegal gambling business out of 881 Third Street. 855 Third Street is allegedly Dennis Atiyeh's residence. (Id. ¶ 42.) The affidavit details several instances where Dennis Atiyeh and others

transported papers from 855 Third Street to 881 Third Street. (Id. ¶ 40, 41.) Agent Bedics also stated his experience that individuals who operate illegal gambling businesses often maintain records relating to the business at their home. (Id. ¶ 54.) Furthermore, bank records for Sports Marketing were sent to 855 Third Street, rather than the offices at 881 Third Street. (Id. ¶ 42.) These allegations sufficiently establish probable cause that evidence of illegality could also be found at 855 Third Street.

Having determined that the affidavit submitted to the magistrate judge establishes probable cause to search both locations, the Court need not examine whether an officer could have reasonably relied on the resultant warrant. Rather, the Court will address Defendant's contention that the affidavit recklessly omits critical information.

Courts suppress evidence obtained during a search conducted pursuant to a warrant that was issued by a magistrate in reliance on a recklessly false affidavit. Williams, 3 F.3d at 74 n. 4 (citing Franks v. Del., 438 U.S. 154 (1978)). An affidavit may be recklessly false where the officer withholds a fact in his ken that a judge issuing a warrant would reasonably wish to know. Wilson v. Russo, 212 F.3d 781, 787 (3d Cir. 2000) (adopting standard outlined in United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993)). Such withholding must be knowing or in reckless disregard of the truth; mere negligence or innocent mistake is insufficient. Wilson, 212 F.3d at 787. At the threshold, the defendant must offer proof of the allegedly recklessly omitted facts. See Franks, 438 U.S. at 71. To ultimately obtain suppression of the fruits of the search, the defendant must prove by a preponderance of the evidence that the information was omitted either knowingly and intentionally or with reckless disregard for the truth, and that the warrant affidavit would not establish probable cause when corrected with the omitted information. See Wilson, 212 F.3d at 787; United States v.

Frost, 999 F.2d 737, 742-43 (3d Cir. 1993).

Defendant submits proof of several facts not contained in the supporting affidavit that he believes establish that ESB was an legal offshore gambling business. The first set of facts relate to a dispute between Sports Marketing and the United States Department of Justice (“DOJ”). (See Def. Mot. to Suppress Ex. A-H.) On December 18, 1995, the Federal Bureau of Investigation advised AT&T that service should be discontinued for the TELEBET line pursuant to 18 U.S.C. § 1084 because the number was being used by ESB to transmit illegal bets. (Id. Ex. A.) AT&T subsequently notified Sports Marketing, the subscriber of the TELEBET line, that service would be terminated on January 26, 1996. (Id. Ex. B.) In a letter to AT&T, Sports Marketing responded that (1) ESB and Sports Marketing are separate entities; (2) ESB is located in Jamaica; (3) ESB does not subscribe to the relevant 800 number; and (4) Sports Marketing does not use the number for any illegal gambling purpose, but rather to provide information concerning the Sports News and related legal enterprises. (Id. Ex. C.) Thereafter, Sports Marketing filed suit seeking a preliminary injunction to prevent termination of the TELEBET line. (Id. Ex. D.) Supporting the motion for an injunction is an affidavit sworn by Dennis Atiyeh asserting that Sports Marketing merely provides information promoting ESB and that ESB is licensed in Jamaica and Antigua. (Id. Ex. E.) In settlement of the suit, Sports Marketing and the DOJ entered into an agreement on January 25, 1996, by which Sports Marketing could retain service on the TELEBET line for sixty days. Sports Marketing, however, was obligated to cease answering the TELEBET line by voice and place a recorded message on the line advising the caller that the telephone line was no longer in service. (Id. Ex. F.) The DOJ in turn promised to close the civil matter. (Id.) Several memoranda written by law enforcement agents detail calls to the TELEBET line made in the days following entry into the settlement agreement. (Id. Ex.

H.) The agents posed as persons interested in placing bets on the Super Bowl. The memoranda all state that live people answered the line and took identifying information from the agents. (Id.) The agents were then called back by persons who claimed to be located in Jamaica and given information about the procedures for opening a betting account. (Id.) The second set of allegedly recklessly omitted facts are outlined in Defendant's Supplemental Memorandum: (1) Pennsylvania State Police incident reports confirming placement of twenty-five bets with ESB between September 26, 1995, and January 28, 1996 to telephone numbers terminating in Jamaica; (2) knowledge of several telephone numbers used to wager with ESB that terminate in Jamaica; (3) statements by former Sports Marketing employees that ESB bets were made offshore and that three Sports Marketing employees run personal bookmaking operations from the Sports Marketing offices against the wishes of Dennis Atiyeh and apart from ESB; and (4) knowledge that ESB was licensed on October 12, 1994 to operate a wagering network in Antigua.

Defendant demonstrates knowing omission as to the second set of facts. At the suppression hearing, Agent Bedics confirmed knowledge of these facts at the time he swore the affidavit. In contrast, Agent Bedics testified that he had no knowledge of any the documents appended to Defendant's Motion as Exhibits A through H or the information contained therein. Defendant argues that knowledge of the Exhibits must be imputed to him by virtue of his status as an federal agent working in conjunction with the DOJ. For the purposes of this motion, the Court will assume without deciding that such knowledge may be imputed to Agent Bedics and that he recklessly or knowingly omitted the relevant facts.

Inserting these omitted facts into the affidavit, the Court concludes that probable cause still exists to support the issuance of the warrant. Defendant grounds his omission argument on the theory

that the affiant was attempting to mislead the magistrate judge into believing that the alleged gambling business was being conducted solely in Pennsylvania. Thus, according to Defendant, facts indicating that the gambling business was being conducted offshore would directly contradict the affidavit. The Court rejects such a reading of the affidavit. As Defendants conceded at the suppression hearing, liability under section 1955 is sustained where the illegal gambling business is conducted at least in part within the state. See 18 U.S.C.A. § 1955 (West 2000). The affidavit clearly alleges that activities involved in the operation of the alleged illegal gambling business occurred both inside Pennsylvania, and elsewhere including in Jamaica and Antigua. (Aff. ¶¶ 2, 5.) The affidavit contains evidence that ESB has an offshore address and is replete with references to ESB's activities in Jamaica. (See id. ¶¶ 7, 17, 22, 24, 28, 33, 36.) The affidavit further informs the magistrate judge that only activity taking place within United States borders is regulated by federal and/or state law. (Id. ¶3.) One could reasonably read the affidavit to allege a gambling operation being conducted in part legally offshore and in part illegally within Pennsylvania at 881 Third Street. The additional facts submitted by Defendant merely confirm that ESB may also have been conducting part of its operations legally offshore in Jamaica and Antigua. Such facts do not negate, controvert, or cast doubt upon any information or inference that the business may have been operated at least in part within Pennsylvania.

None of the other omitted information prevents the corrected affidavit from establishing probable cause. Defendant's and other employee's denials of ESB's involvement in gambling within Pennsylvania when weighed against the information included in the affidavit do not sufficiently undermine a finding of probable cause. Evidence of the resolution of the dispute between Sports Marketing and the DOJ do not subvert a finding of probable cause. The Court notes that the

agreement between Sports Marketing and the DOJ related to violation of 18 U.S.C. § 1084, not section 1955 or 1956. Furthermore, the memoranda by federal agents detailing the contents of their telephone calls to the TELEBET line possibly indicates noncompliance with the agreement by Sports Marketing.

Having determined that the affidavit both as originally submitted and including the omitted facts states probable cause to search both the 881 and 885 Third Street locations, the Court denies Defendant Dennis Atiyeh's Motion.

III. MOTION REGARDING SEARCH OF ALLENTOWN STORAGE LOCKER

On May 3, 1996, while executing the search warrant at 881 Third Street, IRS agents and state police officers learned of the existence of an outside storage facility where records were kept from Mark Hovan ("Hovan"). Although he is presently employed by English Sports, at the time of the search Hovan was an employee of Sports News. The officers had Hovan take them to a storage warehouse at 1018 Quebec Street in Allentown, Pennsylvania. After allegedly signing a consent form permitting the officers to search, Hovan unlocked a storage locker that had been rented to hold business records. Defendant Dennis Atiyeh argues that Hovan had no authority to consent to the search, and alternatively that any consent was involuntary and given under duress.⁸

It is well settled that the government may undertake a search without a warrant or probable cause if an individual consents to the search, and any evidence discovered during such a search may be seized and admitted at trial. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). In addition to consent being voluntary, the person giving consent to search must have the authority to do so. United States v. Matlock, 415 U.S. 164, 171 (1974). Authority to consent to search may be actual

⁸For the same reasons outlined earlier, Joseph Atiyeh lacks standing to challenge this search.

or apparent. See Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). Actual authority derives from the concept of common authority over the searched premises:

Authority to consent to a search arises from mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171 n. 7.

Applying this standard, the Court determines that Hovan had actual authority to consent to the search of the storage locker because he had joint access and control over the locker. Although Hovan rented the locker at Dennis Atiyeh's behest, Hovan admitted at both the suppression hearing and in front of the grand jury that he leased the storage facility in his name, using his credit card to pay the down payment and some of the monthly installment payments. He had unrestricted access to the storage locker and its contents. At the suppression hearing, Hovan stated that he also had the power to grant or deny permission for other employees to enter the storage locker. All of these facts indicate Hovan's independent ability to access the locker and are sufficient to establish his authority to consent to the search. Dennis Atiyeh's reimbursement of the down payment and installment payments to Hovan, and the possible presence of the business name on the lease merely indicate that the access and/or control was shared. Such facts do not negate or limit Hovan's joint ability to freely access the storage locker. Having found that Hovan had actual authority to consent to the search of the locker, the Court need not address the issue of apparent authority.

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." Schneckloth, 412

U.S. at 222. "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Id. at 227. Accordingly, whether consent was given is to be resolved by examining all relevant factors, without giving dispositive effect to any single criterion. United States v. Kim, 27 F.3d 947, 954 (3d Cir. 1994). Certain factors that courts consider in determining whether confessions were voluntary, such as the age of the accused, his education, his intelligence, whether he was advised of his constitutional rights, and whether the questioning was repeated and prolonged are relevant to any examination of consent to search. Kim, 27 F.3d at 954. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent; nor is the government required to advise the defendant of his right to refuse consent before eliciting his consent. Id. (citing Schneckloth, 412 U.S. at 227, 231-34).

Defendant argues that the law enforcement officers coerced Hovan into granting consent by creating a frightening atmosphere, threatening to arrest him, and preventing him from reading the consent form that he signed. Hovan testified at the suppression hearing that when the officers appeared at 881 Third Street to execute the search warrant, they burst into the offices with guns drawn, yelling questions about the location of guns and money. The officers made all of the employees move away from their desks and lay face down on the floor where they were then handcuffed. The officers then took Hovan into a separate room where they asked him questions about his identity and his position with the company. At some point his handcuffs were removed. When Hovan was asked where the company records were kept, he told them about the storage locker. Hovan claims that he agreed to take the officers to the locker after they told him that if he did

not cooperate he would be in trouble and could go to jail. Telling Hovan to keep his head lowered, the officers escorted Hovan out the back door. Defendant argues that the officers did this to evade the company's lawyers who were arriving through the front door.

Once in the police car, Hovan gave the officer directions to the storage locker. The officers asked Hovan if they could enter the locker. Hovan assented and unlocked the unit. The Government submits a consent form allegedly signed by Hovan. (Gov. Ex. C.) Although confirming the presence of his signature on the consent form, Hovan has no recollection of ever reading the form. (Gov. Ex. B at 94 ll. 23-24.) At the suppression hearing, Hovan testified that he was never given the opportunity to read the consent form because the officers covered body of the form. Hovan, however, confirmed that at the time he knew that a search was going to be conducted and that the officers might take items from the locker. (Gov. Ex. B at 96 ll. 2-6.)

Based on the totality of these circumstances and the Kim factors, the Court determines that Hovan's consent was voluntary. The Court has no doubt that Hovan may have been frightened and alarmed by the method in which the officers entered the 881 Third Street offices. Hovan, however, displayed a competent presence of mind by his ability to retrieve the key and direct the officers to the location of the locker. Additionally, Hovan admits to seeing the company's lawyers on the premises as the police escorted him to a car. Had he felt truly under duress, he could have alerted them and sought help. Furthermore, Hovan had time to calm down on the drive to the storage facility.

Once at the storage facility, Hovan's consent was implied by his actions and knowledge. Hovan admits understanding that the officers would search and possibly remove items from the locker. Even if the officers prevented him from reading the consent form, he knew that the officers

would search if he opened the locker granted them to entry. Hovan, therefore, knew the effects of his consent. In fact, one reason why he opened the locker is because he did not think it contained anything of value to them. (Gov. Ex. B at 96 ll. 6-7.)

With respect to the Kim factors, there is little personal information about Hovan in the record. Hovan, however, is an married adult with several children. When testifying, he certainly appeared to this Court to be intelligent enough to understand the events at hand and make a reasoned judgment about a proper course of action. From Hovan's description of the events, the interview with police in the office about the existence of the storage locker and the exchange with the police just prior to opening the locker was fairly brief, rather than prolonged. It is not dispositive that Hovan was never specifically informed about his right to refuse consent. See Kim, 27 F.3d at 954. The totality of the facts and circumstances do not indicate that Hovan's will was so overborne as to render his consent to search the locker involuntary. The Court, therefore, denies Defendant's motion.

IV. CONCLUSION

In summary, the Court finds the affidavit both as originally submitted to the magistrate and as corrected with the omitted facts contains sufficient allegations to establish probable cause with respect to 881 Third Street and 855 Third Street. Dennis Atiyeh lacks standing to contest the search of 5702 Vicksburg Drive. Lastly, the Court finds that Mark Hovan had actual authority to consent to the search of the storage locker and granted consent knowingly and voluntarily. Dennis Atiyeh's Motions to Suppress are therefore denied. Joseph Atiyeh's Motions are denied since he lacks standing to challenge any of the searches. An appropriate Order follows.