

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

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	NO. 04-757
CHARLES D. LOWERY,	:	
Defendant.	:	

Diamond, J.

November 15, 2005

MEMORANDUM

The government has charged Charles Lowery with one count of embezzlement from the Federal Reserve Bank. 18 U.S.C. § 656. Lowery moves to suppress a cash strap holding \$10,000 that authorities recovered from Lowery's lower pants leg. The facts as I have found them confirm the propriety of the authorities' seizure of this evidence. Accordingly, I deny Defendant's motion.

FINDINGS OF FACT

On July 22, 2005 and September 8, 2005, I conducted an evidentiary hearing on Lowery's suppression motion. The Government called two witnesses, both employees of the Federal Reserve: Cash Services Officer Michelle Scipione, and Carlton Spriggs, the Assistant Vice President and Director of Protection. Lowery also testified at the hearing, and called Secret Service Agent Timothy Spiess; Sergeant Frederick Henderson, a security officer at the Fed; and Barry Pitts, the former Manager of the Cash Register Department. All the witnesses except Lowery testified consistently and compellingly. I credit their testimony, discredit Lowery's

contradictory version of events, and make the following factual findings.

On November 4, 2004, Lowery worked in the cash processing room of the Federal Reserve Bank in Philadelphia. 9/8/05 Tr. at 24. His duties included counting cash deposits made by private commercial banks. 7/22/05 Tr. at 6-7, 10. Processing room employees work with rolls or “straps” of hundred dollar bills, which customarily contain \$10,000 (one hundred \$100 bills). Id. at 53. To deter theft, employees in the cash processing room work in pairs and are under continuous video surveillance. Id. at 6.

The Fed’s Audit Department responds to customer inquiries and cash deposit report irregularities. Id. at 5-6. On November 4, 2004, the Audit Department notified Ms. Scipione of a \$10,000 shortage in a deposit made on August 9, 2004. Id. at 5-9. Ms. Scipione reviewed the cash room surveillance tape for that day. The tape -- which I viewed at the suppression hearing -- plainly shows Lowery placing a cash strap into his waistband. Id. at 6, 8. Ms. Scipione showed the videotape to several other Fed officials, including Mr. Spriggs. Id. at 9.

In light of the videotape, the Fed officials agreed to keep Lowery under surveillance. Id. at 10. They decided to have a plainclothes security officer watch Lowery while he worked, beginning the following day, November 5, 2004. Almost immediately, however, Lowery forced them to accelerate their plans. Following normal protocol, Ms. Scipione and her staff began to monitor Lowery on the live video feed from the cash processing room. Id. at 11-12. Ms. Scipione testified that she saw Lowery inappropriately lingering at a currency container, adjusting his pants legs, and reaching beneath his smock. Id. At the suppression hearing, I viewed the November 4th cash room video, and it plainly shows Lowery reaching under his smock to secrete a cash strap.

Ms. Scipione also reviewed data in the cash automation computer system and discovered that Lowery's team was reporting a \$10,000 discrepancy for November 4th. Id. at 13. Ms. Scipione thus became concerned that Lowery was about to remove that money from the Fed.

Ms. Scipione informed Mr. Spriggs of her suspicions. Id. at 14. Mr. Spriggs then reviewed images of Lowery on November 4th and agreed with Ms. Scipione's conclusions. Id. at 62-65. Accompanied by Mr. Pitts, Mr. Spriggs approached Lowery in the vault room. 9/8/05 Tr. at 6-7. Neither Mr. Spriggs nor Mr. Pitts was dressed in a uniform. 7/22/05 Tr. at 48. Mr. Spriggs was armed, but his weapon remained concealed. 9/8/05 Tr. at 20. With a calm demeanor, Mr. Spriggs introduced himself to Lowery, and asked him if he would come with them to Mr. Pitts's office. 7/22/05 Tr. at 49. Lowery agreed, and accompanied Mr. Spriggs, Mr. Pitts, and Sgt. Henderson to Mr. Pitts's office – an ordinary business office containing Mr. Pitts's desk and chairs. Id. at 50. Mr. Spriggs, Sgt. Henderson, and Lowery all testified credibly that Lowery was not handcuffed, threatened, or physically restrained on the way to Mr. Pitts's office. 7/22/05 Tr. at 49-50, 104; 9/8/05 Tr. at 36.

When Mr. Spriggs asked Lowery about the August 9th and November 4th cash shortages, Lowery said he knew nothing about them. Id. at 51. Mr. Spriggs then advised Lowery that he had the right to remain silent; the right to have an attorney present; that any statement he made could be used as evidence against him in court or elsewhere; that an attorney could be appointed for him if he could not afford one; and that if he answered questions without an attorney, he had the right to stop answering at any time. Id. at 51-52; 9/8/05 Tr. at 37-38. Mr. Lowery indicated that he understood his rights. 7/22/05 Tr. at 52; 111.

Mr. Spriggs next asked Lowery whether he had any money on his person. Id. at 52.

Lowery said he did not. Mr. Spriggs asked Lowery if he would agree to be searched. Id. at 52. When Lowery did not respond, Mr. Spriggs again asked if Lowery would agree to be searched. Id. Lowery voluntarily consented to this second request. Id.; 9/8/05 Tr. at 13-14; 21. During the course of this search, Mr. Spriggs found the strap containing \$10,000 in Lowery's left pants leg. 7/22/05 Tr. at 53; 9/8/05 Tr. at 21-22. Mr. Pitts, Mr. Spriggs, and Lowery all testified credibly that Lowery was not handcuffed, physically restrained, or even touched prior to Mr. Spriggs's search. 7/22/05 Tr. at 49-50; 9/8/05 Tr. at 20, 36.

After discovering the strap of \$100 bills, Mr. Spriggs placed it on Mr. Pitts's desk. 7/22/05 Tr. at 53; 9/8/05 Tr. at 22. Mr. Spriggs asked Lowery whether he knew anything about the money, and Lowery said nothing. 7/22/05 Tr. at 54; 9/8/05 Tr. at 22. Mr. Spriggs again informed Lowery of his "Miranda" rights and placed Lowery under arrest. 7/22/05 Tr. at 54.

These facts are supported by videotape and photographic evidence and the consistent and credible testimony of Mr. Spriggs, Mr. Pitts, Ms. Scipione, and Sgt. Henderson. Lowery himself confirms many of the most important facts, including that Mr. Spriggs informed him of his "Miranda" rights. 9/8/05 Tr. at 28-29.

CONCLUSIONS OF LAW

Because I have found that Lowery consented to the search, he is not entitled to suppression of the evidence. Alternatively, I conclude that Mr. Spriggs had probable cause to arrest Lowery and so was entitled to search him.

I. Lowery Consented to the Search.

A consent search is “one of the specifically established exceptions to the warrant requirement.” United States v. Wilson, 413 F.3d 382, 388 (3d Cir. 2005) (quoting United States v. Givan, 320 F.3d 452, 459 (3d Cir. 2003)). Whether or not a search is voluntary is a factual determination. See Ohio v. Robinette, 519 U.S. 33, 40 (1996). In making that determination, I am obligated to examine the voluntariness of Lowery’s actions according to the totality of the circumstances, including “the setting in which the consent was obtained, the parties’ verbal and non-verbal actions, and the age, intelligence, and educational background of the consenting individual.” Givan at 459. See also Schneckloth v. Bustamante, 412 U.S. 218, 226 (1973) (outlining additional factors, including whether the person has been advised of his constitutional rights pursuant to Miranda and the length of detention prior to consent).

The law does not require authorities to inform a suspect of his constitutional rights before obtaining his voluntary consent to be searched. See Hubbard v. Jeffes, 653 F.2d 99, 104 (3d Cir. 1981). Where, as here, the authorities do so inform a suspect, however, it is certainly more likely that his ensuing consent to a search was voluntary. See, e.g., Government of Virgin Islands v. Berne, 412 F.2d 1055, 1062 (3d Cir. 1969); United States v. Chen, 2002 U.S. Dist. LEXIS 6621 (E.D. Pa. Apr. 16, 2002).

Lowery consented to be searched while in the building where he had worked for nearly a year. Compare Miranda at 461 (noting that “the isolated setting of the police station” can be particularly coercive). As I have found, Mr. Spriggs did not threaten, handcuff, or berate Lowery. Further, Lowery has not suggested that he did not understand the authorities’ actions or that his age, intelligence, or educational background render the search involuntary. Accordingly, I have

found that under the totality of the circumstances, Lowery voluntarily consented to the search. As Lowery provided no credible evidence of coercion to offset the convincing and corroborated testimony arrayed against him, I would find that Lowery gave his voluntary consent even absent my finding that Mr. Spriggs informed Lowery of his “Miranda” rights.

II. The Search Was Lawful Because Mr. Spriggs Had Probable Cause to Arrest Lowery for his Actions on August 9, 2004 and November 4, 2004.

I also conclude that the authorities’ actions were proper on an independent and alternative ground: because they had probable cause to arrest Lowery, they were entitled to search him incident to his arrest.

“[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.” United States v. Robinson, 414 U.S. 218, 235 (1973). “[A]s long as probable cause to arrest existed at the time,” it is “immaterial” whether an officer conducts his search before or after arresting a suspect. United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977); United States v. Jenkins, 496 F.2d 57, 73 (2nd Cir. 1974) (Friendly, J.); see also Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) (“[W]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest”).

A law enforcement officer has probable cause to arrest a subject when “the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be

arrested.” Estate of Smith v. Marasco, 318 F.3d 497, 514 (3d Cir. 2003). Even if government witnesses had testified that “there was no probable cause,” as Lowery erroneously suggests, their subjective beliefs are irrelevant to my objective inquiry into whether probable cause actually existed. See Whren v. United States, 517 U.S. 806, 813 (1996) (an officer’s action is valid “as long as the circumstances, viewed objectively, justify that action . . . [s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”). Having reviewed the objective circumstances, I conclude that Mr. Spriggs’s search would have been lawful as a search incident to an arrest for embezzlement. 18 U.S.C. §656.

The elements of the crime of embezzlement of bank funds are: “(1) the defendant was an employee, (2) of a federally connected bank, (3) who took cash or other assets, (4) in the custody or care of the bank, (5) with the intent to injure or defraud the bank.” 18 U.S.C. §656; Valansi v. Ashcroft, 278 F.3d 203, 210 (3d Cir. 2000).

Here, there is no dispute about Lowery’s status as an employee of the Federal Reserve Bank of Philadelphia, satisfying the first two elements. See 7/22/05 Tr. at 44-49; 18 U.S.C. §656 (“any Federal Reserve bank” within scope of statute). Mr. Spriggs knew of the August 9, 2004 and November 4, 2004 cash shortfalls, and watched video imagery of Lowery secreting straps of money beneath his clothing on both days. These facts established probable cause for Mr. Spriggs to arrest Lowery for embezzlement for either the August 9, 2004 or November 4, 2004 incident even before the questioning and search.

Although Mr. Spriggs acted with an abundance of caution by not arresting Lowery immediately after viewing the videos, he nonetheless had a lawful basis to arrest and thus to search Lowery before making the arrest. See United States v. Riggs, 474 F.2d 699, 704 (2d Cir.

1973) (“postponement of the further intrusion of arrest does not remove the justification for the search”); People v. Simon, 290 P.2d 531, 533 (1955) (Traynor, J.) (“[I]f the officer is entitled to make an arrest on the basis of information available to him before he searches . . . there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest.”). Mr. Spriggs’s search of Lowery and the recovery of the strap of \$100 bills was thus proper. See Chatman at 567.

Accordingly, I will deny Lowery’s Motion to Suppress Physical Evidence. An appropriate order follows.

Date

Paul S. Diamond, J.

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	:	
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	:	NO. 04-757
CHARLES D. LOWERY,	:	
Defendant.	:	

ORDER

AND NOW, this 15th day of November, 2005, upon consideration of the Motion of Defendant Charles D. Lowery to Suppress Physical Evidence, it is hereby ORDERED and DECREED that the motion is DENIED and the physical evidence seized from the defendant's person at the time of his arrest on November 4, 2004 is admissible at trial.

Paul S. Diamond, J.