

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

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL ACTION</b>
<b>v.</b>	:	
	:	<b>No. 05-41-1</b>
<b>JAMES T. BOWEN, JR.</b>	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**March 6, 2007**

Defendant James Bowen is charged with: (1) knowingly and intentionally attempting to manufacture fentanyl in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(C); (2) knowingly and intentionally attempting to manufacture fentanyl within 1,000 feet of a public playground in violation of 21 U.S.C. § 860(a); (3) knowingly using and maintaining a place for the purpose of manufacturing fentanyl in violation of 21 U.S.C. § 856(a)(1); and (4) knowingly failing to appear for a bail revocation hearing under 18 U.S.C. §§ 3146 (a)(1), (b)(1)(A)(i). Presently before the Court is Defendant’s motion to suppress the evidence obtained by law enforcement officials as a result of their search of his house and garage on December 17, 2003. For the reasons set forth below, the motion is denied.

**I. BACKGROUND**

On October 4, 2006, Defendant James Bowen filed a motion to suppress and requested a *Franks* hearing.<sup>1</sup> Defendant contends that the evidence seized from his house and garage on

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<sup>1</sup> Pursuant to *Franks v. Delaware*, “where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to a finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request.” 438 U.S. 154, 155-56 (1978).

December 17, 2003 should be suppressed because: (1) Defendant was illegally seized by the police and did not give voluntary consent to the search of his house and garage; and (2) the affidavit in support of the warrant to search Defendant's house and garage, which police later obtained, included material misstatements and omissions rendering it legally insufficient.

Beginning November 21, 2006 and continuing on November 29, 2006, the Court held suppression and *Franks* hearings. Detective John Newell and Agent Joseph Ruta testified for the Government. The defense called attorney Mark Sheppard, Defendant's brother Jeffrey Bowen, and eyewitness Paula Bellenzini. On February 5, 2007, after additional briefing, the Court again held oral arguments regarding the suppression motion. Based on the submissions of the parties and the testimony and evidence presented at the hearings, the Court makes the following findings of fact.

## **II. FINDINGS OF FACT**

On October 28, 2003, Detective John Newell of the Newtown Police Department was called to investigate a theft reported at 3540 Winding Way in Newtown, Pennsylvania.<sup>2</sup> (Nov. 21, 2006 Tr. at 21-22.) Upon his arrival, Newell met with Defendant, who explained that five or six guns had been stolen from a cabinet in his garage. (*Id.* at 22.) Defendant told Newell that he had last seen the guns two days earlier. (*Id.* at 22-23.) When Defendant told Newell that he kept magazine pictures of his guns in his bedroom, Newell asked to see them; however, both Defendant and his mother refused to let the officers into the house. (Def. Ex. 33 (Oct. 28, 2003 Police Report) at 4.)

Independent of the October 28<sup>th</sup> incident, the Bureau of Alcohol, Tobacco and Firearms

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<sup>2</sup> The Court credits the testimony of Detective Newell.

(“ATF”) was investigating a gun trafficking ring in Camden, New Jersey in October 2003.<sup>3</sup> (Nov. 21, 2006 Tr. at 90.) During that investigation, a gun was recovered on October 17, which was registered to James Bowen in the Pennsylvania State Police Record of Sale System and was among the guns that Defendant reported stolen on October 28, 2003.<sup>4</sup> (*Id.* at 91, 101.) The Record of Sale System also indicated that Defendant owned several other firearms. (*Id.*) ATF Agents Joseph Ruta and Adam Cameron decided to interview Defendant in connection with the recovered gun. (*Id.* at 91-92.)

On December 17, 2003, at approximately 8:30 a.m., Agent Ruta, Agent Cameron, and Task Force Officer Andre Hicks went to Bowen, Inc., a family-owned business, to speak with Defendant. (*Id.* at 94.) The officers wore plain clothes and traveled in an unmarked vehicle. (*Id.* at 94-95.) Agent Ruta’s weapon was not in plain view, however, he did not recall if the other officers had their guns displayed during the encounter. (*Id.* at 95.) When they arrived at Bowen, Inc., they were met by Jean Bowen, Defendant’s mother, and by Paula Bellenzini, an office employee. (*Id.* at 94; Nov. 29, 2006 Tr. at 99.) The officers explained that they wanted to question James about a gun recovered during one of their investigations. (Nov. 29, 2006 Tr. at 30.) Jean Bowen asked the officers if they would reschedule the interview, but Agent Ruta said that the matter could not be delayed. (*Id.* at 101.) Jean Bowen called Defendant, who was running business errands, and he arrived at Bowen, Inc. approximately ten minutes later. (Nov. 21, 2006 Tr. at 96; Nov. 29, 2006 Tr. at 30.)

The officers met Defendant in the parking lot when he arrived. (Nov. 21, 2006 Tr. at 96.)

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<sup>3</sup> The Court credits the testimony of Agent Ruta.

<sup>4</sup> The gun was recovered nine days earlier than Defendant told Detective Newell he had last seen it.

They identified themselves, showed their badges, and told Bowen that they wanted to take him to ATF headquarters to interview him regarding a recovered firearm. (*Id.* at 96-97.) Bowen told the police that a number of firearms had been stolen from his house and that he had records regarding those thefts on his office computer. (*Id.* at 97.)

The officers and Defendant went inside the office, Defendant printed out a report of what he provided to the police on October 28, 2003, and he turned it over to the officers. (*Id.* at 100.) Agent Ruta noticed that one of the guns listed had the same serial number as the one recovered in Camden. (*Id.* at 100-101.) He also noted that the gun had been recovered prior to the date that Bowen claimed he had last seen the gun. (*Id.* at 101.)

All four men exited the office, and Defendant asked if he should take his own car to ATF headquarters. (*Id.*) The officers told Defendant that he could ride with them and they would drive him home. (*Id.*) Defendant then asked if he was going to be allowed to go home later that day, and Agent Ruta assured him that he would. (*Id.* at 102.) The four men entered the car and Defendant sat in the backseat with Ruta. (*Id.* at 103.) After they left, Jean Bowen called the family lawyer. (Nov. 21, 2006 Tr. at 82; Nov. 29, 2006 Tr. at 104.)

As they were driving to ATF headquarters, Defendant asked the officers if their investigation concerned the Phoenixville pipe bombing case, about which he had previously been interviewed. (Nov. 21, 2006 Tr. at 104.) Ruta explained that he had no knowledge of that case and that their interview was unrelated to the Phoenixville bombing. (*Id.*) Ruta then began questioning Defendant about his firearms – both the ones reported stolen and the ones remaining in his possession. (*Id.*) Defendant told him that he had a number of guns still at his house. (*Id.* at 106.) Ruta asked if he

could see the rest of the guns, and Defendant again agreed. (*Id.*) Agent Cameron made a U-turn, and Defendant gave him directions to his house. (*Id.*)

When the officers arrived at the Bowen residence, Defendant indicated that his guns were in his bedroom and that he would retrieve them. (*Id.*) Ruta asked Defendant if the officers could go with him as a safety precaution, and Defendant again agreed. (*Id.* at 106-107.) Defendant brought all three officers up the stairs to his bedroom and unlocked the padlock on his bedroom door. (*Id.* at 107-108.) Some of Defendant's guns were lying in plain view on the floor and others were in drawers. (*Id.* at 108.) The officers removed the bullets from all of the guns lying on the floor without allowing Defendant to touch any of them. (*Id.*) Defendant then opened the drawers containing guns, pointed out where the guns were located, and the officers removed the bullets. (*Id.*) Ruta asked Defendant if they could bring his guns to ATF headquarters to make an accurate report about which guns were stolen. (*Id.* at 110.) Defendant agreed and gave the officers a duffel bag to carry the weapons. (*Id.*) The officers then left the bedroom with the guns without conducting any further searches. (*Id.* at 109.) Once outside the bedroom, Ruta asked if he could see the place from where the guns had been stolen, and Defendant agreed to take the officers to the garage. (*Id.* at 111.)

All four men proceeded down the stairs and through the rear of the house to the backyard where the garage was located, without stopping or searching other parts of the residence. (*Id.* at 110-11.) After Defendant unlocked and opened the garage door, the officers noticed a standing locker, with the warning: "FLAMMABLE. KEEP FIRE AWAY." written across the front. (*Id.*) On the other side of the garage were glass flasks, hoses, a scale, and something resembling a computer. (*Id.* at 115.) Defendant explained that he was a chemistry major at Penn State and that he used the locker

to store his chemicals. (*Id.* at 112.) Ruta asked Defendant if he would open the locker, and Defendant again agreed, taking another key from his ring and unlocking the padlock. (*Id.*) Inside was an open cardboard box filled with chemicals. (*Id.* at 113.) The officers contacted the Drug Enforcement Agency, who informed them that they might be dealing with hazardous materials. (*Id.* at 117.) The officers then notified local authorities and evacuated the Bowen home and the neighboring residences. (*Id.* at 117-18.)

Detective Newell was among the local authorities who responded. (*Id.* at 44.) After speaking with officials at the scene, Newell filed an affidavit of probable cause in support of a request for a warrant to search Defendant's house and garage. The affidavit omitted all of the events that transpired that morning, stating simply that "ATF Special Agent Joseph Ruta went to 3540 Winding Way, Newtown Square, PA., to interview James Bowen, W/M, in reference to a stolen gun." (Def. Ex. 1 (Warrant Affidavit) at 2.) The affidavit further explained that Ruta observed "a large yellow cabinet marked explosives" containing items consistent with a clandestine lab, as well as "beakers, heating mantel, and chemicals." (*Id.*) Newell also included information he received from confidential informants that Defendant had been producing fentanyl in his garage. The information provided by the informants was consistent with the that provided by Ruta and with what Newell had personally observed on October 28, 2003. (*Id.* at 2-4; Nov. 11, 2006 Tr. at 24-25.) Defendant told both informants that he was manufacturing fentanyl, both had been in his garage and personally observed the chemicals and equipment used to produce the fentanyl, and one of the informants had seen numerous bundles of heroin in the garage. (*Id.*) Pursuant to the search warrant, police recovered, *inter alia*, Defendant's chemicals, lab equipment, and various chemical recipes. (Def.

Ex. 1 (List of Items Seized) at 8.)

### III. CONCLUSIONS OF LAW

#### A. The Searches Were Lawful

Over the course of Defendant's encounter with the officers, the officers asked and received Defendant's consent for the events as they occurred. Defendant consented to be interviewed by the officers, to travel with them and then take the officers to his home, to allow the officers into his home, to turn his guns over to the officers, and then to let the police into his garage and locked cabinet. Defendant initially asserts that he was unlawfully seized by the ATF officers rather than engaged in a consensual encounter. Accordingly, he argues, the contraband found by the officers in his garage represents the fruit of that unlawful seizure.<sup>5</sup> Defendant then argues that, even if he was not unlawfully seized, any consent that he gave the officers was involuntary. The Government

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<sup>5</sup> Technically, Defendant argues that he was "in custody" when he consented to the search. However, it is apparent from Defendant's submission that he understands the Fifth Amendment concept of "custody" to be synonymous with the Fourth Amendment concept of "seizure." While the concepts of "custody" and "seizure" are similar, *compare Stiegler v. Anderson*, 496 F.2d 793, 798-99 (3d Cir. 1974), with *United States v. Mendenhall*, 446 U.S. 544, 552 (1980), the legal significance of each is different. A person "in custody" can voluntarily consent to a search; custody is one factor in determining whether consent is voluntary. "[T]he fact of custody alone is never enough to demonstrate coerced consent." *United States v. Forbes*, 181 F.3d 1, 6 (1st Cir. 1999) (citing *United States v. Watson*, 423 U.S. 411, 424 (1976)). However, under the terms of the Fourth Amendment, if a defendant is seized and that seizure is unlawful, then evidence recovered thereafter may be excludable under the fruit of the poisonous tree doctrine. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963) (consent must constitute an intervening act of free will in order to overcome exclusion). Defendant in effect makes a species of this latter *Wong Sun* argument, by explaining, "[w]hen a person manifests his consent contemporaneously with an illegal seizure, 'the conduct of the person seized is not free from the taint of his unlawful detention and, thus, is insufficient to show consent.'" (Def.'s Supplemental Mem. of Law in Supp. of Mot. to Suppress Evidence at 22 (quoting *United States v. Martel*, 966 F. Supp. 317, 322 (D.N.J. 1997) (internal citations omitted)).

responds that Defendant was not seized and that their searches were initially conducted pursuant to Defendant's lawfully given consent, and subsequently conducted pursuant to a validly issued warrant.

*1. Defendant was not seized at his place of business*

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. Not all encounters between the police and citizens rise to the level of a constitutional seizure; a seizure occurs when, "by means of physical force or show of authority, [a citizen's] freedom of movement is restrained." *Mendenhall*, 446 U.S. at 552. It has become axiomatic that police questioning alone, without other indicia of coercion, does not constitute a seizure. *Id.* at 554; *see also Florida v. Royer*, 460 U.S. 491, 497 (1983). "Moreover, 'the fact that the officer identifies himself as a police officer, without more, [does not] convert the encounter into a seizure requiring some level of objective justification.'" *United States v. Thame*, 846 F.2d 200, 202 (3d Cir. 1988) (*quoting Royer*, 460 U.S. at 497) (alterations in original).

In determining whether a seizure has occurred, a court must consider, under the totality of the circumstances, whether a reasonable person would feel free to "disregard the police and go about his business," or to "decline the officers' request [and] terminate the encounter." *United States v. Wilson*, 413 F.3d 382, 386 (3d Cir. 2005) (*quoting United States v. Kim*, 27 F.3d 947, 951 (3d Cir. 1994)). An officer may ask an individual to consent to speak with him as long as the officer does not convey the message that compliance is required. *Florida v. Bostick*, 501 U.S. 429, 436-37 (1991). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by

an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officers' request might be compelled." *Mendenhall*, 446 U.S. at 554. The government bears the burden of showing that any seizure conducted without a warrant is constitutionally reasonable. *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995).

Applying these principles, the Court finds that no seizure occurred at Bowen, Inc. This encounter transpired at Defendant's family-owned business, with his mother nearby; Defendant was in a friendly environment. Similarly, nothing about the appearance or demeanor of the officers would indicate to a reasonable person that compliance was compelled. The officers wore plain clothes and drove an unmarked vehicle. Even if two of the officers were wearing their weapons in plain sight, there was no indication that the weapons were ever employed as an instrument of coercion or intimidation. *See United States v. Drayton*, 536 U.S. 194, 205 (2002) ("The presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.")

The officers immediately identified themselves to Defendant upon his arrival. They "asked but did not demand" that Defendant accompany them to ATF headquarters to discuss the recovered weapon and show Defendant photographs of the person apprehended. *See Mendenhall*, 446 U.S. at 555. They never raised their voices, touched Defendant, or in any way wielded their authority as a means of intimidation. Although the officers accompanied Defendant inside Bowen, Inc. to print the report about his stolen guns, they did not "escort" him but rather "walk[ed] with him as you would walk with anybody else normally," and they remained a few feet behind him while he sat at

the computer.<sup>6</sup> (Nov. 21, 2006 Tr. at 100, 104.)

Defendant calls into question the extent of the officers' knowledge about him prior to their arrival. Agent Ruta testified that they knew only that: (1) Defendant's gun was recovered in Camden; (2) Defendant had purchased multiple weapons in the past; and (3) Defendant had no criminal history. (Nov. 21, 2006 Tr. at 91; Nov. 29, 2006 Tr. at 33.) Defendant posits that if the agents had done a more thorough background check or spoken with the Newtown Police Department, they would have known that Defendant had been contacted in connection with the Phoenixville bomber case and that he was currently under investigation for suspected manufacture of fentanyl. Defendant argues that this knowledge would have made the officers more likely to create an atmosphere of subtle coercion. *See Steigler*, 496 F.2d at 799. Because the Court explicitly credits Agent Ruta's testimony regarding the officers' knowledge (or lack thereof), there is no support for Defendant's assertion that the officers' prior knowledge infected their outward behavior.

Based on these facts, the Court concludes that the encounter at Bowen, Inc. was a consensual one. The fact that the officers did not tell Defendant that he could terminate the encounter does not affect this decision. *See Mendenhall*, 446 U.S. at 555 (voluntariness does not require police to inform of right of refusal); *United States v. Lowery*, Crim. A. No. 04-757, 2005 WL 3078222, \*3 (E.D. Pa. Nov. 15, 2005) ("The law does not require authorities to inform a suspect of his constitutional rights before obtaining his voluntary consent . . .") (internal citations omitted). The officers gave Defendant no reason to believe that he could not refuse their requests or otherwise

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<sup>6</sup> Even if the Court credited the testimony of Ms. Bellenzini that the officers crowded around Defendant, that would be insufficient to mandate the conclusion that Defendant was bound to acquiesce in the officers' requests. *See Drayton*, 536 U.S. at 203 (bus passengers not seized though police stood over them during questioning).

terminate the encounter. *See id.*

2. *Defendant voluntarily consented to leave Bowen, Inc. with the officers*

Having determined that no seizure occurred, the Court turns to the question of whether Defendant's consent to accompany the agents was voluntary. While there is no singular definition of voluntariness, a court should look at the totality of the circumstances, including the characteristics of the accused and the nature of the police inquiry. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-26 (1973) (“[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.”). Additional factors in determining voluntariness include the defendant's age, education, intelligence, the setting in which the consent was gained, the parties' verbal and non-verbal actions, the length of any detention, repeated or prolonged nature of the questioning, or the use of physical punishment such as deprivation of sleep and food. *Id.*; *Wilson*, 413 F.3d at 388. Courts evaluating voluntariness should consider “all relevant factors, without giving dispositive effect to any single criterion.” *Kim*, 27 F.3d at 955; *see also United States v. Hernandez*, 872 F. Supp. 1288, 1297 (D. Del. 1994). Ultimately, the government must show by a preponderance of the evidence that consent was an exercise of free will and not the result of a defendant's critically impaired capacity for self-determination. *Schneckloth*, 412 U.S. at 225-26.

For many of the reasons discussed above in connection with the seizure analysis, there is no indication that Bowen's consent to go with the officers to ATF headquarters was involuntary. None of Defendant's personal characteristics – age, intelligence, or education – left him vulnerable in his interactions with the police. The questioning occurred at his workplace, with his mother nearby, and

lasted no more than a few minutes. The fact that Agent Ruta told Defendant that he should ride with the officers to ATF headquarters rather than take his own car fails to persuade the Court that Bowen's consent to accompany the officers was involuntary.

3. *Defendant voluntarily consented to take the officers to his house*

Continuing to address the events seriatim, once inside the ATF vehicle, the officers asked Defendant if they could see the other guns he kept at his house. Once again, Defendant consented. The circumstances of this encounter, which occurred while Defendant was riding with the agents in an ATF vehicle, present a closer question of voluntariness. Nonetheless, because the Government need only prove voluntariness by a preponderance of the evidence, the Court applies the principles expounded above and concludes that Defendant's consent to take the officers to his house was voluntary. The fact that consent is given in cramped confines does not, by itself, compel a finding of involuntariness. *See Bostick*, 501 U.S. at 436 (consent can be voluntary on bus, where one officer questioned passenger from above and other officers stood at front and back of bus); *Drayton*, 536 U.S. at 203 (consent *was* voluntary in same bus situation); *Kim*, 27 F.3d at 954 (consent was voluntary when obtained by officer standing at only exit from train sleeper car). Additionally, the fact that consent was obtained in a setting controlled by officers does not compel a finding of involuntariness. *See Mendenhall*, 446 U.S. at 554 (consent voluntary in DEA offices);<sup>7</sup> *United States v. Velasquez*, 885 F.2d 1076 (3d Cir. 1989) (consent voluntary when given from back of police car

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<sup>7</sup> The Court in *Mendenhall* noted: "Counsel for the respondent has also argued that because she was within the DEA office when she consented to the search [of her person], her consent may have resulted from the inherently coercive nature of those surroundings. But in view of the District Court's finding that the respondent's presence in the office was voluntary, the fact that she was there is little or no evidence that she was in any way coerced." 446 U.S. at 559.

pulled over on highway). Finally, the Court notes that, although not the factual scenario presented here, voluntary consent can even be obtained after a defendant has been arrested. *United States v. Watson*, 423 U.S. 411, 424 (1976).

There is no evidence that the officers engaged in either overt or subtle acts of coercion to obtain Defendant's consent to go to his house. Taking into account the totality of the circumstances, including those factors discussed above and with specific consideration for the setting in which consent was obtained, the Court concludes that Defendant's consent to take the officers to his house was voluntary.

4. *Defendant voluntarily consented to allow the officers to enter his house, garage, and locked cabinet*
  - i. *Entry into Defendant's house*

Defendant next argues that the officers entered his house only by a "show of lawful authority," and, as such, Defendant did not voluntarily consent to the search of his house. Agent Ruta testified:

A: When we got [to Defendant's house], we got out of the car and Mr. Bowen indicated that the guns were up in his bedroom. At that point he said, I'll go up and get them. I told him I'd like for us to come with you, just for safety precautions. . . .

Q: So, did you ask him if you could accompany him to the bedroom?

A: Yes.

Q: And what did he say?

A: And he indicated that that would be okay.

(Nov. 21, 2006 Tr. at 106-107). On cross examination, defense counsel asked: "You essentially asserted your authority and said that you had to go get the guns, is that correct?" (Nov. 29, 2006 Tr.

at 46.) Agent Ruta replied, “Correct.” (*Id.*) Defendant characterizes this as a unlawful assertion of authority, thereby vitiating any consent Defendant may have given.

In making this assertion, Defendant relies on *Bumper v. North Carolina*, 391 U.S. 543 (1968), and *United States v. Molt*, 589 F.2d 1247 (3d Cir 1978), both of which held that, when police make a “claim of lawful authority” to enter a private building, such entry is not the product of consent. This case is distinguishable from both *Bumper* and *Molt*. In those cases, agents essentially conveyed a message that ‘the law permits my entry regardless of your permission.’ *See Bumper*, 391 U.S. at 548 (The officers’ representation that they had a search warrant “announced in effect that the occupant has no right to resist the search.”); *Molt*, 589 F.2d at 1251-51 (The agents’ false impression that they had statutory authority to search defendant’s records, even without a warrant, “weigh[ed] heavily against a finding that consent was voluntarily given.”). Here, the message conveyed by Agent Ruta was comparable to ‘for our safety, we would like to oversee the handling of your guns.’ There was no coercion or duress influencing Defendant’s decision to allow the officers to accompany him to his room. Had Defendant told the officers that he did not want them to enter his home, (as the record indicates he has told officers in the past) the situation would be different. (*See* Def. Ex. 33 (Oct. 28, 2003 Police Report) at 4.)<sup>8</sup> Nothing in the record indicates that Defendant’s consent to

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<sup>8</sup> Defendant also cites *United States v. Marrese* to support his contention that he did not consent to the police entry. 336 F.2d 501 (3d Cir. 1964). In that case, the Third Circuit found that a police search of the defendant’s upstairs bedroom was neither incident to arrest nor obtained with consent. *Marrese* was decided before *Schneckloth*, *Mendenhall*, or *Watson*, when the Supreme Court began developing the legal concept of voluntariness. Moreover, the facts surrounding the consent in *Marrese* were hotly disputed – the defendant argued that he “consented” to the search only after being pushed by police and held at gunpoint, whereas the prosecution argued that consent was given after police had merely “accosted” and arrested defendant. *Id.* at 503. Without describing which set of facts were credited, the Third Circuit rejected the prosecution’s voluntariness argument out of hand. *Id.* 504. *Marrese* is simply

allow the officers into his home was involuntary.

*ii. Defendant not seized*

Once inside, Defendant took the officers up to his room and allowed the agents to unload his weapons and take them to ATF headquarters along with Defendant. Defendant further consented to take the officers into his garage and, once in the garage, to open the standing locker. It was inside the garage and locker that the officers saw the contraband from Defendant's alleged drug activities.

Prior to the moments when Defendant consented to the search of his garage or locked cabinet, no seizure occurred that might trigger the fruit of the poisonous tree analysis. *See Wong Sun*, 371 U.S. at 486. Defendant correctly points out that an interaction that begins as a consensual encounter between the police and a citizen may eventually ripen into a seizure. (Feb. 5, 2006 Tr. at 7); *see INS v. Delgado*, 466 U.S. 210, 215 (1983). Nonetheless, crediting the testimony of Agent Ruta, the Court concludes that the officers were non-threatening at all times, asked permission before each step in the sojourn, never touched Defendant, and never raised their voices; overall, their demeanor was such that a reasonable person "would feel free to decline the officers' request [and] terminate the encounter." *Mendenhall*, 446 U.S. at 552.

*iii. Defendant gave consent at all relevant times*

Finally, the Court concludes that Defendant consented to: (1) allowing the officers to enter his room; (2) allowing the officers to seize the weapons in his room; (3) allowing the officers to enter his garage; and (4) opening his standing locker. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Peyton*

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inapposite; Defendant was not under arrest, there is no contention of a pointed gun or physical assault, and the officers were not on a "fishing expedition."

*v. United States*, 445 U.S. 573, 586 (1980). This presumption extends to the “curtilage” surrounding a home. *United States v. Dunn*, 480 U.S. 294, 300 (1987). Because Defendant’s home and external garage are protected by the Fourth Amendment, the officers must rely on Defendant’s consent to justify their warrantless entry, and subsequent searches and seizures. *See Id.* at 306-307 (defining factors to be used by courts in determining what constitutes “curtilage”).

The officers asked Defendant if they could accompany him to his room, if they could take his guns to ATF headquarters, if they could see the place from where his guns were stolen in October 2003 (his garage), and if he would open the locker. Consistent with the above analysis, each separate consent given by Defendant inside his house and garage was voluntary. Nothing about the officer’s demeanor, dress, verbal tone or physical mien, changed after they arrived at Defendant’s house. Moreover, although the officers knew by the time they were in Defendant’s garage that: (1) Defendant had reported to police that he had last seen his gun after it had already turned up in Camden; and (2) Defendant had been contacted by authorities in connection with the Phoenixville bombing, there is no evidence that would suggest that the officers engaged in psychological trickery or created an atmosphere of restraint to gain consent to search the garage or locker. Finally, the length of the encounter, from Defendant’s arrival at Bowen, Inc. to the time when he opened the locker in his garage, does not suggest coercion; it lasted approximately one hour. (Gov. Ex. 8 (Timeline)); *see also United States v. Gonzalez*, Crim. A. No. 95-52, 1995 WL 628131, at \*4 (D. Del. Oct. 20, 1995) (one hour interview not coercive). As such, the Court finds that Defendant’s verbal consent, most importantly given to the search of his external garage and standing locker, was freely and voluntarily given, and the contraband found within should not be excluded from trial.

**B. The Affidavit in Support of the Warrant Does Not Contain Material Misstatements or Omissions**

In *Franks v. Delaware*, the Court upheld the right of a criminal defendant to challenge the validity of an affidavit made in support of a warrant. 438 U.S. at 155-56. If the defendant meets his burden, then the fruits obtained as a result of the search must be suppressed. *United States v. Yusef*, 461 F.3d 374, 383 (3d Cir. 2006) (citing *United States v. Frost*, 999 F.2d 737, 743 (3d Cir. 1993)). At a *Franks* hearing, the defendant must show by a preponderance of the evidence that: “(1) the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions were material, or necessary, to the probable cause determination.” *Id.* Regarding this second element, courts distinguish between affirmative misrepresentations and omissions. *Id.* “When faced with an affirmative misrepresentation, the court is required to excise the false statement from the affidavit.” *Id.* In contrast, “the court must remove the ‘falsehood created by an omission by supplying the omitted information to the original affidavit.’” *Id.* (quoting *Sherwood v. Mulvihille*, 113 F.3d 396, 400 (3d Cir. 1997)). Thus, with respect to the materiality inquiry, the question is whether a “corrected” affidavit would support probable cause. *Id.*

In the instant case, the affidavit in support of the warrant states: “On 12/17/03, ATF Special Agent Joseph Ruta went to 3540 Winding Way, Newtown Square, PA., to interview James Bowen, W/M in reference to a stolen gun.” (Def. Ex. 1 (Warrant Affidavit) at 2.) This misstates how the agents contacted Defendant and omits the events preceding the officers’ arrival at the Bowen residence.<sup>9</sup> Defendant also notes that the affidavit fails to mention that Detective Newell had

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<sup>9</sup> Defendant also argues that the affidavit omits that the officers searched all of the rooms on the first and second floor of the Bowen residence without his consent. Because this Court

previously been in Defendant's garage and that his own observations were inconsistent with the information provided by the confidential informants. The warrant further states: "While inside the garage Ruta did observe and [sic] large yellow cabinet marked explosives and in the cabinet were numerous items that Ruta believed to [sic] associated with a clandestine lab." Defendant points out that the cabinet was actually blue with a yellow interior, and the written warning was "FLAMMABLE. KEEP FIRE AWAY." Finally, Defendant compiled a list of people he believes were in a position to provide the information supplied by the confidential informants. Each signed a written statement swearing to the fact that he did not provide Detective Newell with the information he attributes to the confidential informants.

As a preliminary matter, this Court held an *in camera* hearing on November 21, 2006 and determined that Detective Newell provided credible testimony as to the reliability of the confidential informants and denied Defendant's motion to reveal their identity. (*See* Nov. 21, 2006 Tr. at 16; Jan. 31, 2007 Order.) Therefore, the Court finds that no falsity as to the informants was included.

Detective Newell testified in open court that he did not include his own personal observations about the inside of the garage because he felt they might be stale. (Nov. 21, 2006 Tr. at 41.) Moreover, Newell testified that his own personal observations *did* corroborate those of Ruta and the two informants. (*Id.* at 24.)

The information omitted from the affidavit about the events of the morning of December 17, 2003, leading up to the officers' arrival at Defendant's home is not material to the determination of probable cause. Additionally, the misdescriptions of the color and warning on the cabinet, when

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credits Agent Ruta's testimony that the officers did not search the other rooms in the house, this part of Defendant's alleged omission is not considered.

struck from the affidavit, do not defeat a finding of probable cause. Without those misrepresentations, the affidavit would still state: “While inside the garage Ruta did observe and [sic] large cabinet and in the cabinet were numerous items that Ruta believed to [sic] associated with a clandestine lab.” Agent Ruta’s largely undisturbed observations, which corroborated the observations of two confidential informants, still support a finding of probable cause even after misrepresentations are struck and the omissions inserted. Because Defendant has not shown that even a corrected affidavit would lack probable cause, this Court will not disturb the warrant and the material obtained pursuant to the resulting search will not be suppressed.

#### **IV. CONCLUSION**

The Court concludes that there was no constitutional infirmity to require the suppression of the material obtained from Defendant’s house or external garage. An appropriate Order follows.

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

**UNITED STATES OF AMERICA**

**v.**

**JAMES BOWEN**

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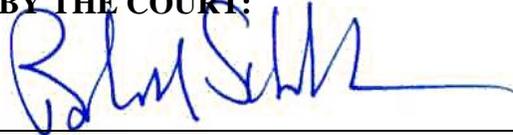
**CRIMINAL ACTION**

**No. 05-41-1**

**ORDER**

**AND NOW**, this **6<sup>th</sup>** day of **March, 2007**, upon consideration of Defendant's Motion to Suppress and Request for a *Franks* Hearing (Document No. 19), the Government's responses thereto, and for the foregoing reasons, it is hereby **ORDERED** that the motion is **DENIED**.

**BY THE COURT:**



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**Berle M. Schiller, J.**