

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

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**UNITED STATES OF AMERICA**

**v.**

**BENJAMIN E. GONZALEZ,**  
**Defendant.**

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**CRIMINAL ACTION**

**NO. 13-516-1**

**MOTION TO SUPPRESS PHYSICAL EVIDENCE**  
**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**RUFE, J.**

**JANUARY 30, 2014**

Defendant Benjamin Gonzalez is charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) and possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k). Defendant has filed a Motion to Suppress the two guns that form the basis of the indictment, claiming that the police discovered the guns in the course of an unlawful search. Upon consideration of Defendant’s Motion to Suppress, the Government’s response thereto, the evidence, testimony, and oral argument presented at an evidentiary hearing on the Motion, and upon further review of the hearing transcript, the Court now enters its findings of fact and conclusions of law.

**I. FINDINGS OF FACT**

1. In the early morning of September 7, 2012, Defendant Benjamin Gonzalez, a felon previously convicted of selling drugs,<sup>1</sup> was attacked and kidnapped. The assailants stole his house keys and asked Mr. Gonzalez who was at his house. Mr. Gonzalez said that his girlfriend

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<sup>1</sup> Suppression Hr’g Tr. (“Tr.”) 102:14–20, January 9, 2014; Gov’t Exh. G-1.

and two brothers were there; the assailants threatened to kill the people at the house, and Mr. Gonzalez told them that he had a safe at home with \$3,000 in it that they could take.<sup>2</sup>

2. That same morning, two armed men broke into a house at 5126 Walker Street, Philadelphia, in the Eastern District of Pennsylvania, where Amanda Cordero lived with Mr. Gonzalez.<sup>3</sup>

3. Ms. Cordero was at home with her child, but Mr. Gonzalez was not there.<sup>4</sup>

4. After entering the house, the two men handcuffed Ms. Cordero, searched the house, and left.<sup>5</sup>

5. Ms. Cordero then telephoned her mother, who did not answer.<sup>6</sup>

6. After failing to reach her mother, Ms. Cordero called her cousin Clementina Ortiz.<sup>7</sup>

7. Ms. Ortiz in turn called her brother, Philadelphia Police Officer Victor Ortiz.<sup>8</sup>

8. Officer Ortiz then called the incident into the police.<sup>9</sup>

9. Philadelphia K-9 Police Officer Sean Elkins responded to a police radio call reporting the home invasion.<sup>10</sup>

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<sup>2</sup> Gov't Ex. G-1.

<sup>3</sup> Tr. 81:19–82:20.

<sup>4</sup> Tr. 83:13–14; 94:25.

<sup>5</sup> Tr. 82:21–83:2

<sup>6</sup> Tr. 99:14–100:2.

<sup>7</sup> Tr. 83:4–9, 100:3–5.

<sup>8</sup> Tr. 83:24–84:7.

<sup>9</sup> Tr. 83:24–25.

<sup>10</sup> Tr. 6:2–6:7.

10. Upon Officer Elkins' arrival at 5126 Walker Street, Ms. Cordero and her child were across the street from the house with Officer Ortiz.<sup>11</sup>

11. Ms. Cordero was still handcuffed when Officer Elkins arrived. Officer Ortiz asked Officer Elkins for a handcuff key; he gave Officer Ortiz a key, and Officer Ortiz unlocked Ms. Cordero's handcuffs.<sup>12</sup>

12. After Ms. Cordero was uncuffed, Officer Elkins and an Officer Cahill, who also responded to the scene, asked Ms. Cordero whether anyone else was in the house. When she replied that she did not know, they entered the house to make sure that it was clear and that the people nearby were safe.<sup>13</sup>

13. During this protective sweep of the house, Elkins and Cahill searched only for persons. When they found none, a police officer was stationed at the front door to secure the house.<sup>14</sup>

14. After the house was secured, Ms. Cordero asked if she could go back into the house to retrieve some items for her baby because she was going to be interviewed later that day at the police district.<sup>15</sup>

15. Officer Elkins asked a supervisor for permission, which was granted under the condition that Officer Elkins accompany her.<sup>16</sup>

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<sup>11</sup> Tr. 20:12–13.

<sup>12</sup> Tr. 8:3–11.

<sup>13</sup> Tr. 8:17–10:5.

<sup>14</sup> Tr. 9:25–10:23.

<sup>15</sup> Tr. 23:12–20.

<sup>16</sup> Tr. 12:25–13:11.

16. Officer Elkins and Ms. Cordero entered the house. Officer Elkins maintained close proximity to Ms. Cordero at all times.<sup>17</sup> They went into the kitchen, where Ms. Cordero picked up a trash bag, which she filled with items for her baby from the kitchen and the nursery.<sup>18</sup>

17. Ms. Cordero proceeded to the bedroom she shared with Mr. Gonzalez, with Officer Elkins very close behind her.<sup>19</sup>

18. The bedroom contained a bed, a chest of drawers, and a nightstand. The nightstand was located to the right of the bed as viewed from the foot of the bed.<sup>20</sup>

19. After retrieving her own clothing from the chest of drawers, Ms. Cordero, with Officer Elkins directly behind her, went over to the nightstand and opened a drawer.<sup>21</sup>

20. Having accompanied Ms. Cordero across the room to the nightstand, Officer Elkins observed the contents of the open drawer, namely, a ledger and two handguns, one with an extended magazine.<sup>22</sup>

21. Officer Elkins then ceased her retrieval of any more personal items and escorted her from the house.<sup>23</sup> Ms. Cordero told Officer Elkins that the guns belonged to her boyfriend, who is Mr. Gonzalez.<sup>24</sup>

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<sup>17</sup> Tr. 14:1; 16:1–3; 26:23–27:6.

<sup>18</sup> Tr. 13:15–21.

<sup>19</sup> Tr. 14:1–2.

<sup>20</sup> Tr. 14:18–21, 14:25–15:2.

<sup>21</sup> Tr.14:18–16:3.

<sup>22</sup> Tr. 16:6–12.

<sup>23</sup> Tr. 16:18–21.

<sup>24</sup> Tr. 16:19–20; 17:4–10; 82:1–4.

22. As Ms. Cordero testified, the nightstand was on Mr. Gonzalez's side of the bed.<sup>25</sup> Ms. Cordero never used the nightstand,<sup>26</sup> and Mr. Gonzalez was the only other person who had access to the nightstand.<sup>27</sup>

23. Later that morning, Ms. Cordero went to the police station to be interviewed regarding the morning's events. She was permitted to travel in her own car and was not in police custody.<sup>28</sup>

24. On the same day, Detective Robert Zielinski prepared a warrant to search 5126 Walker Street for firearms, in part on the basis of information from Officer Elkins about his observations when he was inside the house with Ms. Cordero.<sup>29</sup>

25. When executing the search warrant, Detective Zielinski found and seized a .40 caliber handgun and a Glock with an extended magazine. These guns were found in the nightstand.<sup>30</sup>

## **II. DISCUSSION**

Mr. Gonzalez has moved to suppress the two guns. He contends that it was Officer Elkins who opened the nightstand drawer, not Ms. Cordero, and that opening the drawer constituted an unlawful search. Since Officer Elkins discovered the guns by violating the Fourth Amendment, Gonzalez argues, their later seizure (pursuant to a search warrant) was "fruit of the poisonous tree," and the guns should be suppressed.

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<sup>25</sup> Tr. 88:12–17.

<sup>26</sup> Tr. 93:7.

<sup>27</sup> Tr. 105:15–24.

<sup>28</sup> Tr. 49:6–12.

<sup>29</sup> Tr. 55:12–25; Gov't Exh. 1.

<sup>30</sup> Tr. 57:13–16; Gov't Exh. 2.

According to Officer Elkins, Ms. Cordero opened the nightstand drawer. Because two armed gunmen had invaded Ms. Cordero's home, Officer Elkins followed closely behind Ms. Cordero to ensure that she did not contaminate the crime scene. When Ms. Cordero opened the drawer, Officer Elkins saw, in plain view, two firearms that he suspected were evidence of a crime. Later, police secured and executed a search warrant and seized the firearms.

#### **A. Applicable Law**

If a police officer lawfully gains entry to a home and perceives contraband in plain view, its subsequent seizure pursuant to a lawfully obtained warrant does not violate the Fourth Amendment.<sup>31</sup> It does not matter if the police officer deliberately looked for contraband in plain view: as long as the officer is lawfully in a place where contraband is in plain view, the perception of the contraband is legal.<sup>32</sup>

However, if a police officer exceeds the scope of his lawful purpose in conducting a search, anything discovered as a result of going beyond the officer's authority must be suppressed. For example, in *Arizona v. Hicks*, a police officer had authority to perform a limited protective sweep of a home, where he saw an expensive turntable, which he moved to record the serial number so that later he could research whether it had been reported stolen. The Supreme

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<sup>31</sup> *Texas v. Brown*, 460 U.S. 730, 739 (1983) ("It is important to distinguish 'plain view,' as used in *Coolidge* to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. . . . [T]he latter generally involves no Fourth Amendment search . . . ."); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); cf. *Maryland v. Buie*, 494 U.S. 325, 330 (1990) ("There is . . . no dispute that if [a policeman's] entry . . . was lawful, the seizure of [evidence] which was in plain view and which the officer had probable cause to believe was evidence of a crime was also lawful under the Fourth Amendment."); *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("Merely inspecting those parts of [evidence not specified in a warrant] that came into view during the . . . search [that was the lawful objective of the entry into the apartment] would not have constituted an independent search, because it would have produced no additional invasion of [a defendant's] privacy interest.").

<sup>32</sup> *Horton v. California*, 496 U.S. 128, 140 (1990) ("Once . . . the officer has a lawful right of access, however, no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent.").

Court held that moving the turntable constituted an unconstitutional search because the police had no probable cause to believe that the turntable had been stolen.<sup>33</sup>

**B. The Issue Before the Court is Whether Ms. Cordero or Officer Elkins Testified Credibly About who Opened the Nightstand Drawer**

In this case, if the Government's version of the facts is accepted, the search was constitutional. The parties agree that the only issue in this case is whether Officer Elkins or Ms. Cordero told the truth about who opened the drawer.<sup>34</sup> Officer Elkins' accompanying of Ms. Cordero through the house to make sure that she did not disturb evidence in the active crime scene was as much a part of his duties as a first responder as performing the protective sweep of the home was in *Maryland v. Buie*. And even if he was looking for contraband when he observed the contents of the drawer that she opened, the Supreme Court has held that inadvertence is not required to legitimate a plain view search.<sup>35</sup> He reported the guns to a detective who determined that Mr. Gonzalez was a convicted felon, thereby giving the police probable cause to seize the guns as evidence of a crime.<sup>36</sup>

At the same time, if Gonzalez's version of the facts is accepted, the guns should be suppressed. Elkins accompanied Cordero to "protect[] the integrity of the crime scene."<sup>37</sup> The Government does not assert that Cordero consented to a search of the nightstand. Opening the drawer would have exceeded the scope of Officer Elkins' lawful purpose in accompanying Cordero and would constitute an unconstitutional search. The Government does not contend that

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<sup>33</sup> *Hicks*, 480 U.S. at 326.

<sup>34</sup> Tr. 4:7-14.

<sup>35</sup> *Horton*, 496 U.S. at 140.

<sup>36</sup> Gov't Ex. G-1.

<sup>37</sup> Gov't Br. at 6.

there would have been a basis for the search warrant to issue had Officer Elkins not seen the guns in plain view when Ms. Cordero opened the drawer.

If Officer Elkins opened the drawer, the search was unconstitutional, and the later warrant should be invalidated as “fruit of the poisonous tree.”<sup>38</sup> There is no suggestion that the later warrant would have been obtained absent Officer Elkins’ observation of the weapons in the drawer. As the parties agreed at the Suppression Hearing, the crucial question in this case is whether Officer Elkins or Ms. Cordero is more credible on the subject of who opened the nightstand drawer.<sup>39</sup>

**C. Officer Elkins’ Version of Events is More Credible than Ms. Cordero’s**

The parties have presented conflicting testimony about the events of September 7, 2012. Because the challenged search was warrantless, the Government bears the burden of proving its version of the facts by a preponderance of the evidence.<sup>40</sup>

Officer Elkins testified credibly on direct and cross-examination that he was standing directly behind Ms. Cordero when she opened the drawer of the nightstand.<sup>41</sup> There was a plausible reason for his presence in Ms. Cordero’s room and his proximity to her, namely, to keep the crime scene secure and to make sure that Ms. Cordero did not—deliberately or inadvertently—disturb any evidence in the house. Furthermore, there was no testimony that

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<sup>38</sup> *Segura v. United States*, 468 U.S. 796, 804 (1984).

<sup>39</sup> Tr. 4:7–14.

<sup>40</sup> *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995) (“As a general rule, the burden of proof is on the defendant who seeks to suppress evidence. *See United States v. Acosta*, 965 F.2d 1248, 1256 n. 9 (3d Cir.1992) . . . However, once the defendant has established a basis for his motion, *i.e.*, the search or seizure was conducted without a warrant, the burden shifts to the government to show that the search or seizure was reasonable. *See United States v. McKneely*, 6 F.3d 1447, 1453 (10th Cir.1993).”). *Accord* Wright et al., 3A Fed. Prac. & Proc. Crim. § 689 (4th ed.) (“If the police searched without a warrant, the government carries the burden to bring the case within one of the exceptions to the warrant requirement.”). *United States v. Matlock*, 415 U.S. 164, 177 (1974) (holding that burden of proof is preponderance of the evidence).

<sup>41</sup> Tr. 15–16, 27.

Officer Elkins searched anywhere in the house other than the nightstand. It does not stand to reason that sudden curiosity would have overcome him on seeing the nightstand when before he had done nothing other than trail Ms. Cordero to keep watch over what she was taking from the house.

At the same time, several details in Ms. Cordero's testimony are not credible. She testified that in addition to Officer Elkins, her cousin Ms. Ortiz was in the house<sup>42</sup> and that Ms. Ortiz was in the bedroom or in the doorway to the bedroom when the guns were discovered.<sup>43</sup> But tellingly, the defense never called Ms. Ortiz to testify. The Government contends that Ms. Ortiz was not allowed in the house at all, a credible argument since there was no reason to allow her inside and doing so would have increased the risk of contaminating the crime scene.<sup>44</sup>

Another point that casts doubt on Ms. Cordero's credibility concerns some money that was stolen during the home invasion. Ms. Cordero testified that the masked men who invaded her home stole a safe with \$3,000 in it.<sup>45</sup> She also testified that the money was income from a rental property that she owns.<sup>46</sup> However, according to Detective Zielinski, Mr. Gonzalez claimed that the money in the safe came from Mr. Gonzalez's sale of a vehicle.<sup>47</sup> The two contradictory, benign reports of the source of the money strongly suggest that the money came from illicit activities and further suggest that Ms. Cordero sought to protect Mr. Gonzalez, who

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<sup>42</sup> Tr. 86:11–12.

<sup>43</sup> The Court asked Ms. Cordero, “[W]here was Clementina [Ortiz] when the guns were discovered? THE WITNESS: I’m not sure if she was in the bedroom, but she was in the house. THE COURT: So she was allowed to roam all over the house? THE WITNESS: Not roam around, but when we were all together I’m not sure she was in the bedroom or in the doorway.” Tr. 117:4–12.

<sup>44</sup> Tr. 148:14–149:6.

<sup>45</sup> Tr. 97:13–23.

<sup>46</sup> Tr. 97:21.

<sup>47</sup> Tr. 122:4–20. The parties stipulated that Detective Zielinski would so testify. Although it was not stipulated that Mr. Gonzalez in fact said as much to the Detective, there is no evidence to contradict that conclusion.

the Government believes is involved in the drug trade.<sup>48</sup> Her motivation to protect Mr. Gonzalez manifested itself in the likely untrue account of the source of the \$3,000, and the Court infers that a similar motivation casts doubt on the truthfulness of her representation that Officer Elkins opened the drawer.

The third factor that suggests Ms. Cordero is trying to protect Mr. Gonzalez is that after she was robbed, she did not call the police. Instead, she called her mother and then her cousin.<sup>49</sup> Ms. Cordero offered no reason why she did not call the police, and the most reasonable inference is that she was trying to protect Mr. Gonzalez from whatever might happen if the police were allowed in their home.

Because there are serious reasons to doubt the truth of Ms. Cordero's account of what happened the morning of September 7, 2012, and because there is no reason to doubt Officer Elkins' testimony, the Court accepts Officer Elkins' version of events as true.

### **III. CONCLUSIONS OF LAW**

1. Officer Elkins' observation of the contents of the nightstand drawer did not violate the Fourth Amendment's prohibition on unreasonable searches.

2. The subsequent seizure of the firearms by Philadelphia detectives pursuant to the search warrant was lawful.

### **IV. CONCLUSION**

For the foregoing reasons, Defendant's Motion to Suppress will be denied. An appropriate Order follows.

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<sup>48</sup> Tr. 150:15–18.

<sup>49</sup> Tr. 99:14–18.

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**CRIMINAL ACTION**

**NO. 13-516-1**

**ORDER**

**AND NOW**, this 30th day of January 2014, upon consideration of Defendant's Motion to Suppress Physical Evidence (Doc. No. 12), the Government's Response thereto (Doc. No. 14), and the evidence, testimony, and oral argument presented at an evidentiary hearing on the Motion in open court on January 9, 2014, and upon further review of the hearing transcript, for the reasons stated in the accompanying Findings of Fact and Conclusions of Law it is hereby **ORDERED** that the Motion is **DENIED**.

**IT IS SO ORDERED.**

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**