

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 PHILIP J. MONTEFIORE, ET AL. : NOS. 97-105-02, -03

**MEMORANDUM AND ORDER**

HUTTON, J.

April , 1998

Presently before this Court is the Joint Motion by Defendant Alphonzo Gallo and Defendant Richard Gallo to Suppress Evidence (Docket No. 27) and the Government's response thereto. For the reasons listed below, the defendants' motion is **GRANTED in part and DENIED in part.**

**I. BACKGROUND**

From 1989 through 1995, defendants Alphonzo Gallo and Richard Gallo (the "Gallos") participated in a federally subsidized housing program (the "program"). Second Superseding Indictment ¶ 5. The United States Department of Housing and Urban Development ("HUD") funded the program, and the Montgomery County Housing and Community Development Program ("MCHCDP") administered the funds. Id. ¶¶ 1, 2.

The program's goal was to promote the rehabilitation of rental housing units in Montgomery County. Id. ¶ 3. The program provided that renovations could be subsidized with interest-free

loans, with all debts to be forgiven in ten years, if certain conditions were met. Id. To qualify for the subsidies, a borrower was required to: 1) "rent the property to low to moderate income residents for ten years;" 2)"finance the balance of the rehabilitation project with private funds;" and 3) "rehabilitate the dwelling in conformance with all applicable building codes, HUD requirements and written specifications." Id.

The Gallos own several housing units in Norristown, Pennsylvania. Jt. Decl. of Defs.' ¶ 1. Pursuant to the program, the Gallos received "more than \$500,000 of federal funds . . . to rehabilitate [these] housing units for occupation by low to moderate income individuals." Second Superseding Indictment ¶ 5. In order for the program to forgive the debt, the Gallos were required to fulfill the program's conditions.

In connection with a HUD audit, HUD inspectors and government agents examined the MCHCDP properties, including those owned by the Gallos. Govt.'s Resp. at 1. During warrantless inspections of the Gallo-owned homes, the government representatives searched the interiors of the dwelling units, the basements of the dwelling units, and the roofs of the dwelling units. Defs.' Supp. Mem. at 2. The inspectors discovered that the Gallos: 1) failed to comply with the requisite renovation requirements; 2) falsely certified that the renovations had been

properly completed; and 3) received subsidies in connection with the renovations. Defs.' Jt. Mot. at 2.

On March 4, 1997, a grand jury indicted and charged defendant Philip J. Montefiore ("Montefiore"), a MCHCDP employee responsible for inspecting the Gallos' properties, with multiple counts of making false statements in violation of 18 U.S.C. § 1001. On May 27, 1997, a grand jury returned a superseding indictment, charging Montefiore with eleven counts of making false statements in violation of 18 U.S.C. § 1001. On June 3, 1997, a grand jury returned a second superseding indictment, charging Montefiore with seventeen counts of making false statements in violation of 18 U.S.C. § 1001. In that indictment, the grand jury also charged the Gallos with numerous counts of mail fraud and making false statements, under 18 U.S.C. § 1341 and 18 U.S.C. § 1001, respectively. Further, the grand jury charged Alphonzo Gallo with one count of obstruction of justice, under 18 U.S.C. § 1503. On April 13, 1998, this Court dismissed the charges against Montefiore, after finding that Montefiore was not physically able to stand trial.

Following the second superseding indictment, the defendants filed the instant motion to suppress the evidence seized pursuant to the government's warrantless searches. On April 13, 1998, this Court held a suppression hearing.

## II. DISCUSSION

### A. Standing

The defendants seek to exclude evidence obtained by the government during warrantless searches of the Gallos' rental properties. The Fourth Amendment of the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." U.S. Const. amend. IV. In United States v. Salvucci, 448 U.S. 83, 85 (1980), the United States Supreme Court held that one's "Fourth Amendment rights are personal, and that defendants 'may claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated.'" United States v. Mastrangelo, 941 F. Supp. 1428, 1438 (E.D. Pa. 1996). However, "[a]s the moving party, the defendant has the burden of establishing that he had a legitimate expectation of privacy in the item seized or the place searched." Id. (citations omitted).

"Proof of a 'legitimate expectation of privacy' requires more than proof of ownership of the property seized. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)] (ownership of drugs concealed in a third party's purse, insufficient evidence of a privacy interest in the purse); Salvucci, 448 U.S. at 91-93

(ownership of stolen checks seized in apartment of defendant's mother, insufficient evidence of a privacy interest in the apartment)." United States v. Martinez, 625 F. Supp. 384, 388 (D. Del. 1985). "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . . , property rights are neither the beginning nor the end of this Court's inquiry." Salvucci, 448 U.S. at 91 (citations omitted). Instead, "to prove standing a defendant must demonstrate that he had a legitimate expectation of privacy in the place searched . . . by showing an actual, subjective expectation of privacy which society is prepared to recognize." United States v. Chun Yen Chiu, 857 F. Supp. 353, 358 (D.N.J. 1993) (citing Minnesota v. Olson, 495 U.S. 91, 95 (1990); Salvucci, 448 U.S. at 93; Smith v. Maryland, 442 U.S. 735, 740 (1979); United States v. Dickens, 695 F.2d 765, 777-78 (3d Cir. 1982), cert denied., 460 U.S. 1092 (1983)). Thus, a defendant must show that he had both a subjective and an objectively reasonable expectation of privacy. See United States v. Varlack Ventures, Inc., No.Crim.A.96-229, 1997 WL 530272, at \* 5-6 (D.V.I. Aug. 20, 1997) (applying Fourth Amendment standing test).

In an attempt to meet their burden, the defendants submitted a Joint Declaration. Taking all of the allegations within the Joint Declaration as true, the Gallos: 1) rent,

maintain, inspect, and repair the properties at issue; 2) retain keys to the properties after rental; 3) are on a first name basis with all of the tenants; 4) have an "oral understanding[]" with their tenants, whereby the Gallos "may use [their] keys to enter the properties for maintenance and repairs, normally after advising tenants of an intent to so enter but at any time if there is an emergency;" 5) "inspect the exterior of the properties on a daily basis, six days a week;" 6) "are on call 24 hours per day, seven days a week, to effect repairs at the request of tenants and emergency repairs are done immediately by defendants;" 7) "personally supervise snow removal, grass cutting and landscaping on all rental properties;" 8) and "store materials and supplies belonging to defendants in several of the properties," especially in the basements of unrented properties. Jt. Decl. of Defs.' ¶¶ 2-9.<sup>1</sup>

With respect to the interior and the roofs of the housing units, the defendants have failed to meet their burden. While the defendants have proven that they are devoted landlords, they have failed to show that they had a reasonable expectation of privacy that was violated by the government's inspections. Although the Gallos owned, maintained, and repaired the properties at issue, their connection with the properties was limited to their duties as landlords. The Gallos did not live in

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1. The government does not dispute these facts. See Tr. of 4/13/98 at 14-15.

the rental units at issue, see Chun Yen Chiu, 857 F. Supp. at 358 (finding defendants had standing to challenge search of warehouse where they slept, ate, and spent most of their time within confines of warehouse); further, they lacked control over the persons entering the properties, see Varlack Ventures, Inc., 1997 WL 530272, at \* 5 ("Exclusive control and privacy generally go hand-in-hand."). Thus, "although the [defendants] owned the house[s] in question, they abandoned any expectation of privacy therein by renting the dwelling[s] to" the tenants. Miller v. Kunze, No. CIV.A.86-1776, 1988 WL 138916, at \* 4 (6th Cir. Dec. 28, 1988) (unpublished opinion) (finding landlord lacked standing to challenge search of tenant's house). Therefore, the defendants' motion is denied with respect to the evidence seized during inspections of the rental properties.

The Gallos have met their burden with respect to the basements of the housing units which "were not part of the rental agreement[s]." Defs.' Supp. Mot. at 2. The defendants had exclusive control of these premises. Id. Further, the defendants stored materials and supplies in these locations. Jt. Decl. of Defs.' ¶ 9. Accordingly, the defendants have shown a legitimate expectation of privacy in the basements which were not part of the rental agreements.

When the government conducts a warrantless search, it bears the burden of demonstrating that some exception to the

warrant requirement is present. Illinois v. Rodriguez, 497 U.S. 177, 183-84 (1990). In the instant matter, the government has failed to offer any arguments justifying the warrantless inspections of the non-rented basements. Accordingly, the defendants' motion is granted with respect to the evidence seized as a result of these searches. The defendants, however, retain the burden of proving which specific premises were within their exclusive control and used for storage purposes.

**B. Improper Administrative Inspection**

The defendants contend that the inspections at issue, conducted by HUD, were performed pursuant to a request by the United States Attorney's Office ("USAO"). The defendants allege that the USAO made these requests both before and after the grand jury returned the second superseding indictment. Moreover, the defendants assert that the Federal Bureau of Investigation and the HUD Inspector General conducted joint investigative interviews during this time frame. Thus, the defendants argue that the inspections were improper, under United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).<sup>2</sup>

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2. In the instant action, the alleged cooperative efforts between HUD investigators and the USAO or the FBI are not relevant to the defendants' motion, to the extent the defendants lack standing. See United States v. Shaefer, Michael and Clairton Slag, Inc., 637 F.2d 200, 203 (3d Cir. 1980) (performing standing analysis prior to reaching the improper regulatory conduct).

In United States v. Educational Dev. Network Corp., 884 F.2d 737, 741-43(3d Cir. 1989), cert. denied, 494 U.S. 1078 (1990), the Third Circuit Court of Appeals discussed the USAO's use of subpoenas that the Department of Defense Inspector General issued after the USAO's criminal division began criminal proceedings against the appellants. The Third Circuit discussed the Supreme Court's holding in LaSalle, as it applied to the USAO's actions:

Appellants also argue that the evidence must be suppressed because the USAO's criminal division obtained it pursuant to subpoenas and a search warrant it had caused to be issued in a bad faith attempt to do an end run around the constitutional requirement that indictments be secured only through a grand jury.

. . . .

Appellants rely on dicta in [LaSalle], in support of their position that the use of civil investigative powers is improper when there is an ongoing criminal investigation. LaSalle involved an IRS agent who was using summonses to obtain evidence for a criminal investigation. The Supreme Court held that although an IRS agent has no statutory power to conduct a criminal investigation, it was almost impossible to conduct an IRS investigation without both civil and criminal implications. The Court concluded, based on its prior decision in Donaldson v. United States, 400 U.S. 517, 536 . . . (1971), that so long as the summonses were issued in good faith before the agent referred the case to the Justice Department for prosecution, they were enforceable. To establish bad faith, the complainant had to show that the IRS issued the summons for a purpose other than those authorized by Congress . . . .

Educational Dev. Network Corp., 884 F.2d at 741.

The Third Circuit found that "Appellants' reliance on LaSalle [was] misplaced," because LaSalle "is relevant only in criminal cases involving the IRS." Id. at 742. Moreover, the Court explained that, "[i]n Donovan v. Spadea, 757 F.2d 74, 77 (3d Cir. 1985), the appellant asked us to 'recognize a general, albeit nonconstitutional, rule that administrative subpoenas issued to develop criminal cases are unenforceable.' We noted that these cases relied on by appellant . . . 'do not establish any such general rule.' Donovan, 757 F.2d at 77." Id.

Instead, the Third Circuit embraced a case from the United States Court of Appeals for the District of Columbia. In United States v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142, 1144 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia faced a situation where the Antitrust Division of the Justice Department and the Department of Defense Inspector General performed a cooperative investigation. The District of Columbia Circuit Court found that "the Justice Department was free to guide or influence the Inspector General and his subpoenas, '[s]o long as the Inspector General's subpoenas seek information relevant to his discharge of his duties.'" Educational Dev. Network Corp., 884 F.2d at 743 (quoting Aero Mayflower Transit Corp., 831 F.2d at 1146).

The Third Circuit agreed with the District of Columbia Circuit's finding that "no body of law, whether statutory or regulatory, explicitly or implicitly restricts the Inspector General's ability to cooperate with divisions of the Justice Department exercising criminal prosecutorial authority.'" Educational Dev. Network Corp., 884 F.2d at 743 (quoting Aero Mayflower Transit Corp., 831 F.2d at 1146). Thus, "[a]lthough the USAO's criminal division is traditionally restricted to conducting investigations before a grand jury, on this record [the Third Circuit saw] no law or principle to prevent it from presenting to the grand jury facts properly uncovered in the course of lawful investigations by another agency." Educational Dev. Network Corp., 884 F.2d at 743.

The Third Circuit faced a similar situation in United States v. Shaefer, Michael and Clairton Slag, Inc., 637 F.2d 200 (3d Cir. 1980). In Shaefer, the Pennsylvania State Police conducted a warrantless search and seizure of the defendants' truck, pursuant to an ongoing investigation. Id. at 202. In an attempt to justify the search, the government argued that such a search was permissible under a regulatory scheme designed to weigh vehicles in order to assure that their size and weight conformed to the state's limitations. Id. at 204. However, the government "concede[d] that the purpose of the stop was unrelated to enforcement of the overweight law, and was for an

investigatory rather than regulatory purpose." Id. Under this scenario, the Third Circuit held that "courts will not countenance pretextual use of a regulatory statute for an investigatory purpose unrelated to the regulatory scheme." Id. (citing LaSalle, Donaldson, and Reisman v. Caplin, 375 U.S. 440 (1964)).

In the instant action, the alleged cooperative efforts between HUD Inspector General, the HUD investigators, the USAO and the FBI were clearly permissible. As the Third Circuit stated, the USAO and the FBI were "free to guide" the HUD Inspector General and inspectors, so long as the inspections were "'relevant to [the] discharge of [HUD's] duties.'" Educational Dev. Network Corp., 884 F.2d at 743 (quoting Aero Mayflower Transit Corp., 831 F.2d at 1146). The defendants have not argued that the HUD Inspector General and inspectors were acting unlawfully, or beyond their regulatory powers. Moreover, the defendants have not asserted that the Inspector General or the inspectors were not acting for regulatory purposes. Thus, the defendants' arguments must fail.

An appropriate Order follows.

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O R D E R

AND NOW, this day of April, 1998, upon consideration of the Joint Motion by Defendant Alphonzo Gallo and Defendant Richard Gallo to Suppress Evidence (Docket No. 27), IT IS HEREBY ORDERED that the Defendants' Motion is **GRANTED in part and DENIED in part.**

IT IS FURTHER ORDERED that:

1) the defendants' Motion is **DENIED** as it relates to evidence seized from the interior and the roofs of the rental properties; and

2) the defendants' Motion is **GRANTED** as it relates to evidence seized from the basements of the defendants' housing units, in which the defendants had exclusive control.

BY THE COURT:

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HERBERT J. HUTTON, J.