UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to D. Minn. L.R. 72.2 and 28 U.S.C. § 636, Defendant Thomas Joseph Petters, by and through his undersigned attorneys, files these objections to the Magistrate Judge's Report and Recommendation ("R&R"). [Docket No. 185.]

OBJECTIONS

I. The R&R errs in its conclusion that Mr. Petters has no standing with regard to the search of 4400 Baker Road.

II. The R&R errs in its conclusion that the search and seizure at 4400 Baker Road was lawful—indeed fails to address our principal argument that it was an unlawful general search.

III. The R&R errs in its conclusion that Mr. Petters cannot object to the Government's intrusion upon the attorney-client privilege.

IV. The R&R errs in its conclusion that Mr. Petters' September 24, 2008 statements to law enforcement officials in Las Vegas need not be suppressed.

V. The R&R errs in its conclusion that Mr. Petters October 1, 2008 statements to Robert White need not be suppressed for violation of the McDade Act.

FACTUAL BACKGROUND

I. Factual Background Re: 4400 Baker Road

IRS Special Agent Brian Pitzen testified that on September 24, 2008 he was the evidence custodian for the search at 4400 Baker Road. Fifty-six agents fanned throughout the building, videotaping, labeling rooms, packing boxes. SA Pitzen also conducted an interview. [Tr. at 76-78.]

The building is a four-story office, occupied by many business entities, with Tom Petters' office in the central executive suite identified by search warrant code 3J. [Tr. 79-80.]

The searching officers found shared areas among the Petters businesses, including legal, finance, marketing, and executive. The Petters entities were on the third floor. The second housed Polaroid, the first a cafeteria. The basement was a parking garage where storage areas housed boxes of a blended kind. [Tr. at 83-84.]

The bulk of the records concerning PCI were taken out of the lower level, 40 to 50 boxes, and have been or soon will be reviewed. Six or eight agents were working on the case in some capacity or other as of the time of the hearing. [Tr. at 89, 100.]

Two receptionists were present at the entrance when the FBI search team entered. SA Pitzen denied needing an electronic key card. The agents simply told the receptionists that they were going in and walked on by. [Tr. at 102-105.]

SA Pitzen was unaware of the policy requiring an escort of visitors, or of any restrictions on employees' movement within the building. He had no information on rules in effect that certain employees could not migrate through the building. Mr. Petters did have his own office, of course. [Tr. at 102-105.]

SA Pitzen also admitted that the agents searched the office of David Baer, the company attorney. [Tr. at 103-104.]

Defense witness John Jordan, Vice President of Real Estate and Facilities, had been in charge of the physical premises at 4400 Baker Road since 2002. Before that he was with Fingerhut. [Tr. at 114-115.]

Mr. Jordan said that all visitors were required to enter through the front door where there was a lobby staffed by two receptionists. Visitors would have to sign in and then be escorted personally to the person that they wished to see. All employees had electronic access cards used for entrance to the doors. A security guard came in at 3:30 p.m. and stayed until approximately 8:30 p.m. The receptionists left at 5:00 or 5:30 p.m. The guard closed the building in the evening and provided escort to the parking lot. [Tr. at 115-116.]

To visit the legal department, a person had to sign in, be escorted, and go through a secured door on the third floor, which was opened in the morning and closed late in the evening. [Tr. at 116.]

Mr. Jordan emphasized the company was private in nature and scope. Electronic card access was set up for each individual, each with limits as to where they could go inside. PGW employees, for example, could not venture onto the Polaroid floor. Some

offices, those of White and Coleman, were locked. There were a number of safes, all locked. Cabinets in the building were locked. The computers were secure. [Tr. at 115-118.]

Mr. Petters' card allowed him to go throughout the entire building. He had a master key. [Tr. at 118.]

II. Factual Background Re: Las Vegas Interrogation

Jesse Prieto, a licensed police officer employed by the Nevada Gaming Control Board, met with FBI Special Agents Eileen Rice and Matthew Corten. SA Rice is assigned to the FBI office in Minneapolis. They convened at the Bellagio Hotel and Casino, on September 24, 2008, at 6:30 a.m., along with a hotel security officer. [Tr. at 39-40.]

Mr. Petters was a registered guest in Room 23001. Guests needed their own keycard for access not only to the room but the entire floor. [Tr. at 40.]

The officers arrived at Mr. Petters' hotel suite, via security elevator. The time: 6:55 a.m., the moment federal agents were executing warrants across the United States. [Tr. at 40.]

Mr. Petters answered the door, cell phone in his hand, wearing a robe. Special Agent Rice asked Mr. Petters if she could come in. Mr. Petters assented. Officer Prieto went into the bedroom, looked in the closet, and made sure no one else was there. According to Officer Prieto, SA Rice did not tell Mr. Petters at the beginning of the interview that he did not have to talk. Neither did she state that he did not have to let them in his hotel room. [Tr. at 41-44.]

The situs for the interview became a small table in the suite's anteroom. SA Rice identified herself as an FBI agent for the second time, badge out, credentials shown. [Tr. at 46.]

With that visual in mind, Mr. Petters asked if he was going to be arrested. SA Rice stated that he was not, that she just wanted to talk. She did not read him his Miranda rights. [Tr. at 46.]

Her tone, though, was accusatory. SA Rice announced that Mr. Petters was involved in a Ponzi scheme. He was "perpetuating a fraud," and multiple search warrants were being executed at that moment. Mr. Petters' cell phone rang two times. He looked at the screen. According to Officer Prieto, the agents asked if they could silence the telephone. Officer Prieto took it. [Tr. at 47-48.]

SA Rice told Mr. Petters that he had been signing notes. Mr. Petters stated: "I sign a lot of things I don't read." [Tr. at 48.] She stated that he was signing those notes without secured collateral. Mr. Petters responded that the merchandise existed, and if the merchandise was absent at the moment the note was signed, it was expected to arrive. [Tr. at 48-49, 59-60.]

There need have been confusion. SA Rice never showed him an invoice or note. Mr. Petters stated that he had done a lot of legitimate business. She declined to probe further. [Tr. at 61.] Mr. Petters added what any competent executive would: "I'm the guy in charge and I'll bite the bullet if I have to." [Tr. at 49.]

At this point, Mr. Petters' hotel room telephone rang. The agents became aware that he was talking to his attorney; Mr. Petters so confirmed. SA Corten asked him if he

wanted to keep talking. Mr. Petters was uncertain as to what to do. A second lawyer called, from Mr. Petters' law firm of long standing. Do not talk, Tom, was the advice given. [Tr. at 51-52.]

SA Corten stated that to be on the safe side, the interview would be terminated. The time: 7:20 a.m. [Tr. at 51-52, 62.] Twenty minutes later, SA Rice and Mr. Petters exchanged telephone numbers so "they could stay in contact." According to Officer Prieto, the officers left the room at 7:30 a.m. The Agents' report reveals a departure of 7:40 a.m. [Tr. at 64.]

SA Rice was available to testify. Instead the Government flew Officer Prieto from Las Vegas to Minneapolis, paying for his airplane flight and hotel. Unlike Agents Rice and Corten, Officer Prieto wrote no report of the interview. [Tr. 55-56.]

Officer Prieto carried a nine millimeter Glock handgun. He did not know whether SAs Rice and Corten were armed. Officer Prieto did not know if the room was rented in Mr. Petters' name. He knew very little, and that's why he was brought in for the hearing. [Tr. at 55-58.]

Officer Prieto did not recall the key passage of SA Rice's report: Mr. Petters said he had learned of issues with the purchase orders in 2007. That Mr. Petters had gone to his lawyers in 2007 and asked them to launch an investigation. [Tr. at 61.]

LEGAL ANALYSIS

I. Mr. Petters' Standing

The Magistrate Judge opines Mr. Petters has no privacy interest (with the exception of his private office). We disagree. A person may have a reasonable

expectation of privacy at his place of business—well beyond the "private office." Mancusi v. DeForte, 392 U.S. 364, 368-370 (1968).

Mr. Petters indisputably owns the business entities housed at 4400 Baker Road. He implemented extensive security protocols. The computer system was password-protected. The employees within 4400 Baker Road were secure from one another. Their common link was the owner—Mr. Petters—who had the singular right and authority to access all areas of the building.

On these facts, Mr. Petters has standing. His ownership interests and participation in the business mandate this result. United States v. Schwimmer, 692 F. Supp. 119, 125 (E.D.N.Y. 1988).

The security protocol at 4400 Baker Road likewise evinces Mr. Petters' privacy interest. In United States v. Mancini, 8 F.3d 104, 110 (1st Cir. 1993), a city mayor established an expectation of privacy in an archive attic. The mayor not only maintained an office in the building, but also took steps to ensure records could not be accessed without authorization. Id. The "office in question was noteworthy for its extreme security measures." Id. So it is here.

The legal department, in particular, took extraordinary steps to maintain the privilege and confidentiality. See id. And to the extent any items seized from the office constitute attorney-client privileged material, Mr. Petters has undoubted standing. DeMassa v. Nunez, 770 F.2d 1505, 1506 (9th Cir. 1985).

II. Suppression Of Seized Items Is Mandatory

The R&R failed to address our principal arguments in favor of suppression: that this was an impermissible general warrant.

A. General Warrant

The Fourth Amendment proscribes general warrants that permit "exploratory rummaging." Andresen v. Maryland, 427 U.S. 463, 480 (1976). There must be a "particular description" of the things to be seized, with nothing left to the discretion of the officer. Id.

A warrant violates this rule when it calls for a general seizure of business records from a particular date forward but fails to indicate that the material sought pertains to any specific transactions, or where the Government does not confine its search to any particular files. In re Grand Jury Proceedings, 716 F.2d 493, 497 (8th Cir. 1983). A "laundry list of various types of records" will not save a general search warrant. Id. at 498; see also United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995).

A flawed warrant does not authorize a search of many businesses where the objection of criminal concern is singular. "The description must be as particular as the circumstances reasonably permit. So if the fraud infects only one part of the business, the warrant must be limited . . . ." United States v. Bently, 825 F.2d 1104, 1110 (7th Cir. 1987).

No such limitation was imposed. The Government's lawyers drafted this warrant without due respect to the rich case law that prohibits generalities. The warrant allowed for perusal through computers and records from the legal department without a care for

the attorney-client privilege. The Government relies on the Receiver's blanket waiver after the fact. To be sure, Mr. Kelley was not involved before the search. In late September 2008, He could not waive what wasn't his.

B. Scope Of Search And Seizure

Federal agents also exceeded the scope of the warrant. See Horton v. California, 496 U.S. 128, 140 (1990). The alleged fraud occurred at PCI—the offices of Coleman and White the epicenter. But the search extended far beyond. Seizure of the entire computer system for all Petters entities was excessive in scope. The agents made no effort to ensure that they were searching only the offices and files of PCI and affiliated entities named in the warrant. Nor did they even attempt to seize documents pertinent only to those entities.

Of great concern to the profession is that this warrant gave no probable cause with regard to the legal department. This despite the obvious attorney-client privilege and work product implications. They agents took everything in sight.

C. Good Faith

The Government pleads good faith under United States v. Leon, 468 U.S. 897, 926 (1984). To avoid suppression, the Government must show that its agents relied, in good faith, upon an objectively reasonable warrant. Leon cannot be invoked here, where agents rummaged through every paper and computer record at 4400 Baker Road. See Kow, 58 F.3d at 429.

III. Mr. Petters Is Entitled To Assert The Attorney-Client Privilege

The R&R implies that Mr. Petters has no standing to complain about the Government's bold invasion of the attorney-client privilege, as the Receiver is now company management. This ignores that the Receiver cannot waive a privilege that is jointly held by the business entity and a former manager—Mr. Petters. Diversified Indus. v. Meredith, 572 F.2d 596, 611 n.5 (8th Cir. 1977). We rightly complain.

A. Joint Clients / Joint Representation

A joint representation privilege exists. This form of attorney-client privilege exists where one attorney simultaneously represents two or more clients on a matter of common legal interest, and the communications at issue relate to the same subject matter. In re Pearlman, 381 B.R. 903, 910 (Bankr. M.D. Fla. 2007). Put another way:

> [W]here there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation, will give sufficient force to a subsequent claim to the privilege.

In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975). Once a joint representation privilege is found, the Receiver cannot unilaterally waive the privilege for both the companies and Mr. Petters. John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990); accord In re Grand Jury, 211 F. Supp. 2d 555, 559 (M.D. Pa. 2001).

An assertion of joint representation privilege requires a factual determination by a court, taking into account: (1) the conduct of the attorney and party who is claiming the

privilege; (2) whether the party had separate legal counsel; (3) whether the party had engaged in confidential communication with the attorney; (4) whether the attorney regarded the party as a client; (5) representations regarding joint or separate representation; (6) whether there was a sharing of responsibility for legal fees; and (7) the subjective belief of the party. 1 Rice, Attorney-Client Privilege in the United States § 4:31, at 4-203 to 4-204 (2d ed. 2008).

To show that the legal department was jointly representing the Petters entities and Tom Petters the individual, we attach a small sample of materials from the legal department. [Addendum.] We see the legal department had files, contracts, correspondence purporting to represent Mr. Petters in his individual capacity, jointly with Petters entities. The legal department clearly regarded Mr. Petters the individual as its client, and Mr. Petters justifiably relied. There was and is a joint defense privilege, which must be recognized.

B. Individual Privilege

Mr. Petters has an individual privilege, needless to say.

> [I]f the communication between a corporate officer and corporate counsel specifically focuses upon the individual officer's personal rights and liabilities, then [the privilege may exist] even though the general subject matter of the conversation pertains to matters within the general affairs of the company. For example, a corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability for jail time based on conduct interrelated with corporate affairs.

In re Grand Jury Proceedings, 156 F.3d 1038, 1041 (10th Cir. 1998). This, too, requires an evidentiary hearing. For without it there is little point to talking with a lawyer.

C. Remedy

An in camera review by the Court and/or by special master is appropriate. See, e.g., United States v. Griffin, 440 F.3d 1138, 1140 (9th Cir. 2006) (special master appointed to review documents seized during execution of search warrant for attorney-client privilege). The Court may also question an attorney-witness in camera to determine whether the privilege applies. In re Green Grand Jury Proceedings, 402 F. Supp. 2d 1066, 1067 & n.3 (D. Minn. 2005).

The Magistrate Judge says that we have not specified what is privileged, but how could we? The FBI claims to have segregated documents involving attorney communications and the Receiver claims to have reviewed them and waived the privilege. But we have not been given the opportunity to do a privilege review on these documents. And this does not even get into the electronic records.

We have reviewed a small cross-section of materials from the legal department, and even this small sample shows that Mr. Petters has an individual privilege to assert. [Addendum.] Many are labeled "Thomas J. Petters, Personal." They show that company lawyers advised Tom Petters in his individual capacity alongside his wholly-owned business entities—personal guaranties, asset transfers, real estate transactions, audits, and more. This is confirmed by examining the computer of the chief legal counsel—David Baer. It is not a purely theoretical claim of privilege, as the R&R claims. The defense must be given an opportunity for proffer and a hearing.

IV. Mr. Petters' Las Vegas Statements Must Be Suppressed

Three law enforcement officers interrogated Mr. Petters in his Las Vegas hotel room. No Miranda warning was given when it should have been. The R&R is wrong, and the statements must be suppressed.

"In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation . . . ." Stansbury v. California, 511 U.S. 318, 322 (1994). Factors to be considered are: (1) whether the suspect was under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether the police used strong-arm tactics or deceptive strategies during questioning; (5) whether the atmosphere of the questioning was police-dominated; and (6) whether the suspect was arrested at the end of the questioning. United States v. Czichray, 378 F.3d 822, 827 (8th Cir. 2004).

The police used a coordinated strategy, bringing three armed officers to Mr. Petters' hotel room at 7:00 in the morning, and confronting him in his bathrobe, interrogating him for the better part of an hour. This was the type of coercive, police-dominated environment that Miranda seeks to remedy. United States v. Carter, 884 F.2d 368, 372 (8th Cir. 1989) (accused was in custody for Miranda purposes when he was questioned in office of bank president where he worked, was seated between two postal inspectors with a bank security official present, was questioned for nearly an hour, and was confronted with evidence of guilt); see also United States v. Mahmood, 415 F. Supp. 2d 13, 17-18 (D. Mass. 2006).

The warning should have been given. Because it was not, the remedy is suppression. Moreover, all statements made by Mr. Petters following the initial telephone call by his attorney must be suppressed. Edwards v. Arizona, 451 U.S. 477, 485 (1981).

V. Mr. Petters' Recorded Statements To Robert White Must Be Suppressed

The R&R finds no violation of the McDade Act, even though federal agents used an informant as a mouthpiece, through which to whisper into Mr. Petters' ear. This was improper, and ought to be met with the consequence of suppression. We have previously briefed the matter fully, [Docket Nos. 129, 130], and have nothing more to add, other than to say such conduct gives the Government a free hand to use informants as agents, to pierce the attorney-client relationship, and disregard the Sixth Amendment. As stated in the Affidavit of Jon Hopeman accompanying the motion to suppress, the Government was well-aware of his representation at the time of the contact by a Government agent. We object, and seek suppression of these statements.

Dated: May 11, 2009

s/ Jon M. Hopeman

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