UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:06 CR 134 CDP
	)	DDN
LAWAN S. JAMES,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court upon the motions of defendant Lawan S. James to suppress the identification by Raul Cruz (Doc. 227) and to suppress physical evidence and defendant's statements (Doc. 228). Following the evidentiary hearing, a transcript was prepared and the parties filed post-hearing memoranda.

From the evidence adduced during the hearing, the undersigned makes the following findings of fact and conclusions of law:

FACTS

Raul Cruz interview on May 5, 2006

1. During April 2006, Missouri Highway Patrol Criminal Investigator Scott Stoelting investigated the April 22, 2006 killing of Sergio Burgos. As part of the investigation, Sgt. Stoelting and Sgt. Jeff Heath interviewed Raul Cruz on May 5, 2006, at the Hidalgo County Sheriff's Office in Edinburg, Texas. Cruz had been arrested on a warrant from New Madrid County, Missouri, for the Burgos homicide.

2. Before asking Cruz questions, Sgt. Stoelting provided Cruz a Notification and Waiver of Rights form, Government Exhibit J-1. Stoelting reviewed the form with Cruz. The top part of the form states that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to talk to a lawyer before and during the questioning, that an

attorney would be appointed for him if he could not afford to hire one, and that he had the right to stop answering questions whenever he wanted. Cruz signed the part of the form at 11:10 a.m. The form also contained a Waiver of Rights provision, which Cruz signed, thereby expressly stating that he understood his rights, that he waived his rights, that no threats or promises were made to him, that he was 27 years of age, had a tenth grade education, was self-employed, and that he understood the English language. Gov. Ex. J-1.

3. During the interview, Sgt. Stoelting asked Cruz questions about the killing of Burgos, and Cruz answered them, providing a substantial amount of information. Cruz stated that when Burgos entered the house he was met by two black men. One of them, known as "Dennis" and "D", hit Burgos in the head with a hand gun. The other black man was described by Cruz as not as tall as Dennis,[1] heavier set than Dennis, and having braided hair. Cruz said that both black men shot Burgos and that one of the shots hit Cruz in the leg.[2] Cruz said that Dinwiddie appeared to be in charge. Dinwiddie took Cruz's identification materials and threatened him and his family if he told anyone about the killing. Cruz said that he and the other black man with the braided hair put the body in the trunk of a vehicle, and that the man with braided hair, sitting next to him and pointing a gun at him, forced him to drive for 20 to 30 minutes to a wooded location where the body was dumped in a ditch.

4. No threats, promises, or coercion were used to induce Cruz to cooperate with the officer. During the interview Cruz was permitted to use the restroom, to get a drink, and to just have a

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[1]The officers knew that Dennis Dinwiddie was 6 feet 2 inches tall.

[2]The bullet has remained in Cruz's leg.

break from the questioning. On May 6, 2006, Sgt. Stoelting and Sgt. Heath transported Cruz from Texas to Missouri.

Raul Cruz identifications on May 11, 2006

5. Sgt. Stoelting met with Cruz on May 11, 2006, in custody in the New Madrid County Sheriff's Office. During the interview, Stoelting showed Cruz a single-sheet array of color photographs of six men, Government Exhibit J-2. All of the photos showed black men, appearing to be of similar ages, mostly similar builds,[3] with differing hair styles, and facial hair. Three of the men (subjects 1, 2, and 5) appeared to wear their hair in braids. All but subject 5 appeared to wear mustaches. None wore eyeglasses. Three of the men (subjects 1, 4, and 5) wore what appeared to be dark collarless shirts; the other three wore shirts or jackets with collars. When he handed the photo array to Cruz, Sgt. Stoelting told Cruz that he wanted him to look at the photos and see if he could identify anyone. Cruz immediately pointed to the photo numbered 2 and said that was the man with the braided hair who held the gun on him; this was the photo of Lawan James. At the officer's direction, Cruz initialed and dated the photograph. At the bottom of the photo array sheet, Cruz handwrote, "No. 2 He shot Sergio too and dragged body to car and off and hold me at gun point," and signed his name.

6. Sgt. Stoelting then showed Cruz a second photo array. Cruz looked at it and identified the photo of Dennis Dinwiddie[4] as the taller, thinner black man with glasses who also shot Burgos.

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[3]The faces of subjects 1 and 5 appeared to be slightly fuller than the faces of the others.

[4]Sgt. Stoelting had received information from Michael Meador, another suspect in the killing, about the full name of the person Cruz identified as "D" and "Dennis."

7. During the interview, Sgt. Stoelting did not threaten Cruz or coerce him in any fashion. Although Cruz was in custody during the interview, he was not handcuffed.

Search of Lawan James's residence on May 14, 2006

8. Thereafter, on May 11, 2006, the Circuit Court of New Madrid County issued an arrest warrant for Lawan S. James, charging him with the April 22, 2006, first-degree murder of Sergio Burgos-Gonzales, and armed criminal action. Gov. Ex. J-3.

9. Shortly after midnight on May 13-14, 2006, New Albany, Indiana, Police Officer Paul Haub applied for a search warrant for Cross Creek Apartment No. 27, to search for

> any evidence concerning a homicide, firearms, cell phones, credit card receipts, any receipts that may have been used in the trip from Missouri to New Albany, Indiana, blood, trace evidence, clothing, [and] footwear.

Gov. Ex. J-4 at 1. In support of the application, Officer Haub submitted his written affidavit, which he signed under penalty of perjury, without appearing before the judge who ultimately issued the warrant or before another judge. In the affidavit, Officer Haub recounted the information provided to him by Sgt. Scott Stoelting of the Missouri Highway Patrol. The affidavit stated that Sgt. Stoelting was investigating the Burgos killing on April 22, 2006, that Sgt. Stoelting obtained cell phone records from two other suspects in the homicide, that the records showed calls to the stated telephone number issued to Carrie Smith or Carrie James, that Sgt. Stoelting learned from the Federal Bureau of Investigation that Lawan James had an address at 27 Cross Creek Apartments in New Albany, Indiana, and that Sgt. Stoelting stated that the cell phone registered to Carrie Smith was used by Lawan James near the time of the killing to get in touch with the other suspects. The affidavit stated that Sgt. Stoelting told Officer Haub that Stoelting had acquired a video tape of Lawan James at a

truck stop approximately 15 miles from the scene of the killing approximately 45 minutes before the body was found. The affidavit stated that on May 13, 2006, at approximately 10:15,[5] a vehicle registered to Carrie Smith, with Kentucky license plate 134DFK, was seen returning to Cross Creek Apartments with a black male and a black female, both of whom entered apartment 27. Id. at 3-4.

10. Officer Haub's two-page affidavit was electronically sent by telefax from the Floyd County, Indiana, Prosecutor's Office to Indiana Circuit Judge J. Terrence Cody at 11:38 p.m.[6] on May 13. Judge Cody reviewed both pages of the affidavit. He found probable cause for the issuance of the warrant. At 12:34 a.m. on May 14, 2006, Judge Cody countersigned page two of the affidavit and signed the search warrant.[7] Judge Cody then faxed a copy of the warrant and the second page of the affidavit to Officer Haub.[8]

11. Early in the morning of May 14, 2006, Lawan James was observed by the local police leaving 27 Cross Creek Apartments. The police followed him as he drove away from the apartments, until he was stopped and arrested on the New Madrid County, Missouri, arrest warrant. The arrest occurred at approximately 1:30 a.m.

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[5]Whether a.m. or p.m. was not stated in the affidavit.

[6]See telefax heading line on Gov. Ex. J-4 at 1 and 2.

[7]See handwritten date and time on Gov. Ex. J-4 at 1 and 2.

[8]See telefax heading line on Gov. Ex. J-4 at 1 and 2. The electronic heading indicates that the return fax transmission was made at 12:28 a.m., while the judge handwrote the time of signing as 12:34 a.m. This apparent inconsistency in the time records does not detract from the finding of the undersigned that the judge received the faxed documents from the prosecutor's office before midnight, reviewed them, signed them, and returned them by fax after midnight. See Doc. 307, letter of AUSA Cristian M. Stevens describing post-hearing confirmation by Judge Cody of relevant facts.

The police drove James, and brought his Toyota Camry automobile, to the New Albany Police Department.

12. During the early morning hours of May 14, 2006, after the police received the search warrant from Judge Cody, the search warrant was executed and items were seized. See Gov. Ex. J-4 at 5 (Return of Service of Search Warrant). At the time of the search, a copy of the search warrant was shown to a female who was present in the residence.

Defendant James's statements and
search of vehicle on May 14, 2006

13. At the police department, Sgt. Stoelting and Sgt. William Cooper met with James in an interview room approximately 30 minutes after he was arrested. Right away, Sgt. Stoelting handed James a Missouri State Highway Patrol Notification and Waiver of Rights form, Government Exhibit J-5. The officer read the form to James, stating orally the rights to remain silent and to counsel. After the sentence, "I understand my rights," Lawan James signed his name at 1:50 a.m. Sgt. Stoelting then reviewed the Waiver of Rights portion of the form. James said he was 28 years of age, that he had a 14th grade education, that he was not employed, and that he understood the English language. James signed this portion of the form at 1:51 a.m. Gov. Ex. J-5.

14. After James signed the notification and waiver of rights form, Sgt. Stoelting asked him questions, which Lawan James answered. After about an hour and a half into the interview, the officers and James took a break. The break lasted long enough for James to get something to drink, to use the restroom, and smoke a cigarette. Sgt. Stoelting asked the New Albany police whether video recording equipment was available. When he learned that such equipment was available, he asked that it be used and the rest of

the interview was video recorded. Gov. Ex. J-6.[9] During the recorded portion of the interview, James affirmed that he had previously been advised of his rights. Then the officers gave James an opportunity to state what had happened. Thereafter, in narrative form, with few questions being asked, James described at length the facts that led to the killing of Burgos. He described the shooting by Dennis Dinwiddie and the fact that James himself shot Burgos in the shoulder. James described how he and Cruz, who had himself been wounded by one of the bullets, put the body in the car, how Dennis followed them in another car directing them where to take the body. James described the dumping of the body down into a ditch and he described how the two firearms were disposed of, by being thrown out of the car window when later he and Dinwiddie were driving Dinwiddie's car. At the end of the recorded interview, James reaffirmed his consent to the search of his car. During the interview, James did not appear to be intoxicated by drugs or alcohol, he did not appear to have a mental deficiency, he appeared capable of understanding his rights. At no time during this interview did either of the officers threaten or coerce James, or make any promise to him to induce him to cooperate and give a statement. At no time during the interview was Lawan James handcuffed. Both officers wore plain clothes during the interview. The questioning ended shortly before 4:00 a.m.

15. As of May 14, 2006, Lawan James had been convicted of eight felony offenses.

16. At the end of the interview, Sgt. Stoelting asked James whether he would consent to a search of his Toyota Camry automobile. James said the officers could search the vehicle. In the course of this conversation, James told Sgt. Stoelting that James's mother bought the car for him and that he considers it his

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[9]The undersigned has reviewed the video recording, which lasted approximately one hour.

car. At that time, the officer handed James a Consent to Search form and reviewed it with him. The bottom of the form stated,

> I understand that I have the right to refuse to consent to the search described above and to refuse to sign this form. I further state that no promises, threats, force, or physical or mental coercion of any kind whatsoever have been used against me to get me to consent to the search described above or to sign this form.

Gov. Ex. J-7. At 4:00 a.m. on May 14, 2006, James signed the form thereby expressly consenting to Sgt. Stoelting searching his automobile. Id. During the discussion about searching the car, James told the officer that the only thing the police would find in the car would be his cell phone and some baby clothes in the trunk.[10] At no time during the interview did James attempt to limit the search of his car or of the cell phone in it.

Retrieving electronic data from defendant James's cell phone

17. Sgt. Stoelting searched Lawan James's Toyota Camry in the police station garage and found a Nokia cell phone in the console between the driver's seat and the passenger's seat. When he located it, he saw that the cell phone was on. The officer wanted to retrieve the electronic information on the cell phone, especially the records of the telephone numbers of callers to and from the phone, before another call was received by the phone. From his experience and training, he knew that Nokia cell phones store ten telephone numbers of calls to the phone. When a new call comes into such a cell phone, the telephone erases the data of the last or next previous call (both calls opened and calls missed) received by the phone. Sgt. Stoelting accessed the electronic data on the phone without obtaining a search warrant.

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[10]Later, these are what the police found in the car. The cell phone was found in the console between the driver's seat and the passenger seat.

James's statements on May 16, 2006

18. On May 16, 2006, Sgt. Stoelting, Sgt. Cooper, and New Madrid County deputy sheriff Michael Bixler transported Lawan James in custody[11] from Indiana to Missouri.[12] After the group entered Missouri, Dep. Bixler orally advised James of his constitutional rights to remain silent and to counsel by reading them to him from a card. When he finished reading the rights, Dep. Bixler asked James whether he understood those rights and James answered, "Yes." He asked James whether he wanted to make a statement and James again answered, "Yes." James was then asked if he could show the police where he threw the weapons. James said he would do so and showed the officers the location where he threw the weapons. During this time, James did not appear to be intoxicated by alcohol or drugs, he did not appear to be suffering from any mental impairment, and he appeared capable of understanding his rights. James was then 28 years of age and previously convicted of a felony. No coercion, physical force, or promises were made to get him to cooperate.

James’s statements on May 17, 2006

19. On May 17, 2006, Missouri State Highway Patrol Sgt. William Cooper interviewed Lawan James. Sgt. Cooper took custody of James at the New Madrid County Sheriff's Department and drove him to an apartment in New Madrid. The apartment was an off-site office of the local drug task force. Once in this office, Sgt. Cooper handed James a Notification and Waiver of Rights form, Government Exhibit J-8. Also present during this interview were

[11]As is the usual practice for transporting someone charged with murder, during the trip James was secured with handcuffs, ankle shackles, and a belly chain.

[12]The items seized during the search of James's residence were transported to Missouri at this time by the officers.

New Madrid County Sheriff's Deputies Jason Ward, Terry Stevens, and Jimmy Henderson. Sgt. Cooper then read to James verbatim the statement of the constitutional rights to remain silent and to counsel. After the printed statement, "I understand my rights," James signed his name at 10:58 a.m. Next, Sgt. Cooper read the Waiver of Rights portion of the form to James, filling in from information provided by James that James was 28 years of age, had an Associate degree, was unemployed, and understood the English language. At 11:00 a.m. James signed his name again to the form, thereby expressly stating that he understood his rights, that no threats or promises were made to him, and that he was not being coerced. Gov. Ex. J-8. At this time, James did not appear to be intoxicated by alcohol or drugs, did not appear to be suffering from any mental deficiency, and appeared to be capable of understanding his rights. No threats, promises, or force were used to get him to cooperate.

20. Thereafter, Lawan James was interviewed and graphically described the circumstances of the killing of Burgos. James stood before a large dry board and with a black marker drew a rough schematic of the house where the killing occurred. He then drew the movements of Dinwiddie, himself, Meador, Meador's companion, Burgos, and Cruz as the events leading to and following the shooting unfolded. James described how Dinwiddie shot Burgos twice and how he shot Burgos once. Three of the officers present during the re-enactment positioned themselves as Burgos and Cruz were when shot. Next, James drew on the board a rough drawing of the road area where the body was disposed of down an embankment. See Gov. Ex. J-9.[13] During the re-enactment interview, James was not handcuffed, the officers present wore plain clothes and did not

[13]The undersigned has reviewed the video recording of the re-enactment interview. The recorded interview lasted approximately 45 minutes.

display any weapons or use strong-arm tactics. During the interview, James appeared eager to cooperate.

21. On May 18, 2006, state and federal law enforcement officers searched the area that James indicated and located a black, Springfield Army XP45 .45 caliber handgun.

DISCUSSION

Identification evidence

Defendant Lawan S. James has moved to suppress the out-of-court identification of him by Raul Cruz on May 11, 2006. Defendant argues that the identification process violated his right to due process under the Fifth Amendment to the Constitution and was also unreliable.

Identification evidence violates the Due Process Clause of the Fifth Amendment, if it results from procedures that are unnecessarily suggestive and which may have likely led to an irreparably mistaken identification. Stovall v. Denno, 388 U.S. 293, 301-02 (1967). If the procedures were impermissibly suggestive, the court looks to the totality of the circumstances to determine whether the identification evidence was nevertheless reliable. Manson v. Brathwaite, 432 U.S. 98, 114-16 (1977). In evaluating the reliability of the identification, the Supreme Court described five factors that should be considered: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty the witness demonstrates during the identification; and (5) the length of time between the crime and the identification. Id.

In this case, the identification procedure was not impermissibly suggestive. When he handed the photo array to Cruz, Sgt. Stoelting told Cruz that he wanted him to look at the photos and see if he could identify anyone. The photographic array

consisted of two rows of three photographs each. Each photograph had the subject against a blue background with a head-to-shoulders view. The photos showed black men, appearing to be of similar ages, mostly similar builds, with differing hair styles, and facial hair. Three of the men appeared to wear their hair in braids. All but one appeared to wear mustaches. None wore eyeglasses. Three of the men wore what appeared to be dark collarless shirts; the other three wore shirts or jackets with collars. Nothing in the words spoken to Cruz by the officer, nothing about the photos generally, and nothing about the photo of James drew one's attention to James's photo and made the procedures used impermissibly suggestive.

Also, Cruz's identification of James's photo was reliable. Looking to the Manson factors, Cruz had a very substantial opportunity to view James. While Cruz first met James on the day of the murder, Cruz spent a considerable amount of time with both James and Dinwiddie, first in the house when Dinwiddie and James both shot Burgos, and later driving the car with James sitting next to him holding a gun on him as they drove to dispose of Burgos's body. Cruz spoke with James during these periods of time. Cruz's attention was clearly on both James and Dinwiddie. Cruz's description of James was accurate (shorter and heavier built than Dinwiddie). Cruz identified James's photo immediately; there was no lack of certainty in his recognition of James as one of the men he was with when Burgos was killed. Finally, in the circumstances of the facts at bar, the passage of 19 days from April 22 to the date of the identification was not sufficiently long to render the identification of James by Cruz unreliable.

The motion to suppress identifications should be denied.

Physical evidence seized from James's residence

The physical evidence seized on May 14, 2006, from James's residence should not be suppressed. The Fourth Amendment to the Constitution protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” U.S. Const. amend. IV. To secure these rights, the Fourth Amendment provides “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Id.

Defendant argues that the search warrant issued by the judge in Indiana was not supported by probable cause, because no information linked the place to be searched in Indiana with the crime that had been committed in Missouri, because the information in the supporting affidavit was not corroborated, and because the warrant did not describe the items to be seized with the required particularity.

The issue before this court when reviewing the validity of the issuance of a search warrant is whether the supporting materials gave the issuing judge a substantial basis for concluding that probable cause existed for the issuance of the warrant. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). "Probable cause" means a "fair probability" that evidence of a crime will be found in a given place. United States v. Grubbs, 547 U.S. 90, 95 (2006); Gates, 462 U.S. at 238.

The affidavit of Officer Haub provided information that linked the 27 Cross Creek Apartments with the killing of Burgos in Missouri on April 22, 2006: Missouri State Highway Patrol Sgt. Stoelting had cell phone records of two persons suspected of participating in the killing. Those records included phone calls to a telephone number issued to Carrie Smith or Carrie James, who resided with Lawan James at 27 Cross Creek Apartments in New Albany, and that the same cell phone was used by Lawan James near the time of the killing to contact other suspects in the killing.

The affidavit stated that Sgt. Stoelting told Officer Haub that Stoelting had acquired a video tape of Lawan James at a truck stop approximately 15 miles from the scene of the killing, approximately 45 minutes before the body was found. The affidavit stated that on May 13, 2006, at approximately 10:15, a vehicle registered to Carrie Smith, with Kentucky license plate 134DFK, was seen returning to Cross Creek Apartments with a black male and a black female, both of whom entered apartment 27. These circumstances are sufficient to establish a link between the perpetrators of the killing and apartment 27, which was sufficient to cause a reasonable person to believe that evidence of the crime would be found in the apartment.

The undersigned disagrees with defendant's argument that the information in the affidavit was not corroborated. The affidavit corroborated Carrie Smith's and Lawan James's relationship to the apartment (her vehicle was seen returning to the apartment; the FBI had information that James resided there), Carrie Smith's relationship with Lawan James, a perpetrator of the killing (her cell phone was used by Lawan James to call other suspects in the killing), Lawan James's relationship to the killing (he used Smith's cell phone to call others suspected of the killing and James was videotaped reasonably near the scene of the killing at a time reasonably close to the time the body was found), and the cell phone records of other suspects in the killing indicated calls to the phone of Carrie Smith, a/k/a Carrie James.

The undersigned also disagrees with defendant James that the search warrant did not describe with particularity the items to be seized. One goal of the Fourth Amendment is to ensure that a search will be carefully tailored to its probable cause justification, and will not become a wide-ranging exploratory search. Maryland v. Garrison, 480 U.S. 79, 84 (1987). The particularity requirement serves this goal by preventing general “rummaging in a person’s belongings” and preventing “the seizure of

one thing under a warrant describing another." Andreson v. Maryland, 427 U.S. 463, 480 (1976). Whether or not to seize an item is not within the discretion of the officer executing the warrant. Id.

A search warrant is adequately worded if its description of the evidence to be seized is sufficiently definite to enable the searching officers to identify the property authorized to be seized. United States v. Summage, 481 F.3d 1075, 1079 (8th Cir. 2007), cert. denied, 128 S. Ct. 875 (Jan. 7, 2008). How definite or specific a warrant must be depends on the circumstances of the case and on the type of items involved. Id. The particularity requirement is a standard of practicality rather than technicality. Id.

The search warrant in this case authorized the search and seizure of any evidence of a homicide, firearms, cell phones, credit card receipts, other receipts used in the trip from Missouri to New Albany, blood, trace evidence, clothing, and footwear. The gist of the information in the search warrant affidavit was that Sergio Burgos was killed in New Madrid County, Missouri, on April 22, 2006; at least two others were suspected as involved in the killing; that a weapon was used in the killing (James was charged with armed criminal action as well as murder); that James was a suspect in the killing and had been videotaped reasonably near the scene of the killing near the time the body was found; that a cell phone was used to communicate with suspects in the killing; and that Smith's car (within which was a black man and a black woman) was seen near Apartment 27 on May 13, 2006. Thus, key factors of the probable cause included a killing, by several people, a weapon, a cell phone, and travel from Missouri to Indiana. It is reasonable to believe that such factors would involve one or more firearms, one or more cell phones, credit card and other receipts for items consumed on the trip, and items that could reasonably

contain blood and other trace evidence, e.g., clothing and footwear.

The undersigned concludes that the scope of the warrant was reasonably related to and limited to the facts of the probable cause. This was no general search warrant.

Cell phone seized from defendant's vehicle

Defendant argues that Sgt. Stoelting's accessing the electronic data stored in defendant's cell phone was unlawful under the Fourth Amendment. The undersigned disagrees.

The retrieval of electronic data from cell phones is subject to the warrant requirement of the Fourth Amendment. Cell phones have the capacity to store immense amounts of electronic data, including phone numbers, music, photographs, and videos. See United States v. Black, No. 04-CR-162-S, 2004 WL 3091175, at *7 (W.D. Wis. Jan. 7, 2004). They store private information that extends well beyond the telephone numbers of calls received. See id.; see also United States v. Park, No. CR 05-375 SL, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) ("[T]he line between cell phones and personal computers has grown increasingly blurry . . . ."). Many courts have found that people have a reasonable expectation of privacy in the somewhat unsophisticated information stored in mere pagers. United States v. Hunter, 166 F.3d 1211, No. 96-4259, 1998 WL 887289, at *3 (4th Cir. Oct. 29, 1998) (unpublished); United States v. Stroud, 45 F.3d 438, No. 93-30445, 1994 WL 711908, at *2 (9th Cir. Dec. 21, 1994) (unpublished); United States v. Morales-Ortiz, 376 F. Supp. 2d 1131, 1139 (D.N.M. 2004); United States v. Chan, 830 F. Supp. 531, 534 (N.D. Cal. 1993); United States v. Blas, No. 90-CR-162, 1990 WL 265179, at *21 (E.D. Wis. Dec. 4, 1990); see also United States v. Reyes, 922 F. Supp. 818, 836 (S.D.N.Y 1996) (suppressing information taken from pager); but see United States v. Meriwether, 917 F.2d 955, 958 (6th Cir. 1990) (the sender of information to an

electronic pager had no reasonable expectation of privacy in the information he sent).

Thus, the undersigned concludes that defendant James had a reasonable expectation of privacy in the information stored in his cell phone. See United States v. Finley, 477 F.3d 250, 259 (5th Cir.), cert. denied, 127 S. Ct. 2065 (2007) (suspect had a reasonable expectation of privacy in the text messages and call records of cell phone); see also Park, 2007 WL 1521573, at *5 n.3, 12 (granting the motion to suppress evidence obtained from a search of defendant's cell phone, and noting government conceded the defendant had a reasonable expectation of privacy in his phone); Morales-Ortiz, 376 F. Supp. 2d at 1139 ("An individual has an expectation of privacy in an electronic repository for personal data, including cell telephones and pager data memories.").

An established exception to the warrant requirement of the Fourth Amendment is the voluntary consent to the search by the subject. Illinois v. Rodriguez, 497 U.S. 177, 179, 189 (1990). Whether consent was voluntarily given depends upon the totality of the circumstances. United States v. Heath, 58 F.3d 1271, 1276 (8th Cir. 1995). Consent is voluntary if it is the product of an "essentially free and unconstrained choice by its maker." Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); United States v. Bradley, 234 F.3d 363, 366 (8th Cir. 2000).

Factors which indicate that consent was voluntary vel non are the subject's knowledge that he can refuse consent, his age, his intelligence, his level of education, and the nature of any related detention and questioning. Schneckloth, 412 U.S. at 226, 227; United States v. Mendenhall, 446 U.S. 544, 558-59 (1980).

The totality of the circumstances and the relevant factors establish that defendant James voluntarily consented to Sgt. Stoelting's search of the electronic data in James's cell phone. The consent to search his automobile came at the end of the interview on May 14, 2006. That interview occurred during the

early morning hours of May 14 and lasted approximately two hours. Nevertheless, during the review of the video recording of the interview, the undersigned observed that defendant did not appear overcome by any lack of sleep; he appeared alert and coherent. When Sgt. Stoelting asked James whether he would consent to a search of his Toyota Camry automobile, James agreed and expressly consented to the search by signing the Consent to Search form. James indicated an understanding that the scope of the search would include his cell phone which he told the officer was in the vehicle. James was then a mature person, being 28 years of age. He was educated, in that his formal education included two years after high school. No strong-arm tactic or coercion was used to get James to consent to the search. At no time did James limit his consent to the search or exclude the cell phone from the scope of his consent. The search of the cell phone did not exceed James's implied authorization to the officer to search it. United States v. Tirado, 313 F.3d 437, 440 (8th Cir. 2002) (subject's consent to search bedroom was not exceeded when subject impliedly consented to a search of the bag hanging in the closet).

Another exception to the warrant requirement of the Fourth Amendment occurs when there is probable cause for the search and there are exigent circumstances, that is, circumstances that indicate that, if the officer does not act promptly, relevant evidence will be lost. Michigan v. Tyler, 436 U.S. 499, 509 (1978); Cupp v. Murphy, 412 U.S. 291, 294-96 (1973); United States v. Young, Nos. 5:05CR63-01-02, 2006 WL 1302667, at *13 (N.D.W.Va. May 9, 2006) (upholding warrantless search of cell phone where evidence showed that numbers could be erased or lost when phone was de-activated).

In the case at bar, Sgt. Stoelting had probable cause to search James's cell phone. As set forth in the search warrant affidavit of Officer Haub for the search of Cross Creek Apartment 27 earlier in the day, Sgt. Stoelting had cell phone records of

recent calls to and from two other suspects in the killing to James's cell phone. In the context of the investigative information known by Sgt. Stoelting, this information was sufficient to cause a reasonable person to believe that evidence of the criminal activity would be found in James's cell phone. Cf. United States v. Nevils, 897 F.2d 300, 309 (8th Cir. 1990) (probable cause can be found in the information set forth in a search warrant affidavit).

When Sgt. Stoelting searched James's Toyota Camry in the police station garage and found the Nokia cell phone, he saw that the cell phone was on. From his experience and training, he knew that Nokia cell phones store ten telephone numbers of calls to the phone and that, when a new call comes into such a cell phone, the telephone erases the data of the last or next previous call (both calls opened and calls missed) received by the phone. Sgt. Stoelting knew he had to act promptly to retrieve the electronic information on the cell phone, especially the records of the telephone numbers of callers to and from the phone, before another call was received by the phone. Sgt. Stoelting lawfully accessed the electronic data on the phone without obtaining a search warrant.

Defendant James's statements

Defendant James argues that the statements that he made to law enforcement were obtained in violation of the Fifth Amendment and were involuntary. The undersigned disagrees.

The government has the burden of establishing the admissibility of a confession by a preponderance of the evidence. United States v. LeBrun, 363 F.3d 715, 724 (8th Cir. 2004) (en banc).

The statement of a defendant is not admissible, if it is constitutionally involuntary. Chavez v. Martinez, 538 U.S. 760, 770 (2003). To decide whether or not a defendant's statement was involuntary, the court must consider whether it was the result of overreaching, such as coercion, deception, or intimidation, by law enforcement, and in an effort to decide whether his will was overborne and his ability to decide not to cooperate was impaired. United States v. Astello, 241 F.3d 965, 967 (8th Cir. 2001). Such was not the case with defendant James.

On May 14, 2006, Sgt. Stoelting handed James a notification and waiver of rights form as soon as he entered the interview room. James signed the form, acknowledging his rights and waiving them. After signing the form, Sgt. Stoelting asked James questions, and James made statements. After an hour and a half of questioning, James was given a break. When he returned, the interview was videotaped, and on the videotape, James affirmed that he had previously been advised of his rights. During this interview, James did not appear to be intoxicated, impaired, or suffering from any mental deficiency. James was 28, had attended two years of post-secondary education, and was familiar with police procedures, having been arrested several times before. He was not handcuffed, and the officers never threatened or coerced James into making statements. The officers did not make any promises to James to induce his cooperation. Even though the interview was conducted at an early hour, James appeared alert and coherent. His statements

on May 14, 2006, were therefore made voluntarily and responsively, and were not induced by any improper government action. See LeBrun, 363 F.3d at 724.

On May 16, 2006, Dep. Bixler advised James of his constitutional rights to remain silent and to counsel by reading from a card. James responded that he understood these rights, and was willing to make a statement. During this time, James did not appear to be intoxicated, impaired, or otherwise incapable of understanding his rights. The officers did not coerce or physically force James to cooperate. They did not make him any promises to gain his cooperation. His statements on May 16, 2006, were therefore made voluntarily and responsively, and were not induced by any improper government action.

On May 17, 2006, Sgt. Cooper handed James a notification and waiver of rights form as soon as he entered the room. James signed the form, indicating he understood his rights, that no threats or promises had been made, and that he was not being coerced. After signing the form, James made statements. At the time, James did not appear to be intoxicated, impaired, or otherwise incapable of understanding his rights. No threats, promises, or force were used to gain James's cooperation. The officers present wore plain clothes, and did not display any weapons or use strong-arm tactics. James's statements on May 17, 2006, were therefore made voluntarily and responsively, and were not induced by any improper government action.

For each interview, the police properly Mirandized James before questioning him. He waived his rights, North Carolina v. Butler, 441 U.S. 369, 372-76 (1979), and the waivers were voluntary, because they were not induced or coerced by improper government action. See LeBrun, 363 F.3d at 724. His statements may therefore be used against him.

RECOMMENDATION

For the reasons set forth above,

IT IS HEREBY RECOMMENDED that the motions of defendant Lawan S. James to suppress identification evidence (Doc. 227) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant James to suppress physical evidence and defendant's statements (Doc. 228) be denied.

The parties are advised they have thirty days to file written objections to this Report and Recommendation. The failure to file timely, written objections may result in a waiver of the right to appeal issues of fact.

/S/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on March 4, 2008.