

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Criminal No. 08-291 (MJD/FLN)

Plaintiff,

v.

**REPORT AND
RECOMMENDATION**

01 - David Guy McKay
02 - Bradley Neil Crowder,

Defendants.

Jeffrey S. Paulsen, Assistant United States Attorney, for the Government.
Jeffrey C. DeGree, for Defendant McKay.
Andrew H. Mohring, for Defendant Crowder.

THIS MATTER came before the undersigned United States Magistrate Judge on October 22, 2008, on Defendant McKay's Motion to Suppress Statements [#29], Defendant McKay's Motion to Suppress Evidence Obtained in Illegal Search [#30], Defendant McKay's Motion for Disclosure and Suppression of Evidence Obtained by Electronic Surveillance [#31], Defendant Crowder's Motion to Discover and Suppress Evidence Obtained as a Result of August 31, 2008 Search and Seizure [#49], and Defendant Crowder's Motion to Suppress September 3, 2008 Search and Seizure [#53]. At the hearing, the Court received testimony from FBI Special Agent Christopher Langert, St. Paul Police Commander David Korus, and St. Paul Police Officer David Langfellow.

The Government submitted exhibits into evidence during the course of the hearing: Government's Exhibit 1 is a photocopy of a rental agreement for a Chevrolet 12-passenger van from Austin, Texas Capps Van & Car Rental; Government's Exhibit 1A is a photocopy of a rental agreement for a U-Haul trailer; Government's Exhibit 2 is a photograph of an open U-

Haul trailer containing homemade shields; Government's Exhibit 2A is a photograph of helmets and homemade black and orange shields lying on the ground; Government's Exhibit 3 is a photocopy of an application for search warrant, supporting affidavit, and search warrant for the Dayton Avenue residence in St. Paul, Minnesota signed by Ramsey County District Court Judge Joanne M. Smith; Government's Exhibit 4 is a photograph of an open black backpack and bolt cutters on a striped piece of furniture; Government's Exhibit 5 is a Advice of Rights form dated September 4, 2008 signed by Defendant McKay; Government's Exhibit 6 is an audio recording of SA Langert's interrogation of Defendant McKay on September 4, 2008; Government's Exhibit 6A is a partial transcript of SA Langert's September 4, 2008 interrogation of Defendant McKay; Government's Exhibit 7A is a photograph of the basement of the Dayton Avenue residence with an ironing board, basket and white towel in the foreground; Government's Exhibit 7B is a photo of an outside wall and exterior basement door of the Dayton Avenue residence, St. Paul, Minnesota; Government's Exhibit 7C is a photograph of a brown piece of furniture, a black duffel bag, and four Molotov cocktails; Government's Exhibit 7D is a photograph of a black duffel bag and four Molotov cocktails.

The matter was referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.1. For the reasons which follow, this Court recommends Defendant McKay's Motion to Suppress Statements [#29] be granted in part and denied in part, Defendant McKay's Motion to Suppress Evidence Obtained in Illegal Search [#30] be granted in part and denied in part, Defendant McKay's Motion for Disclosure and Suppression of Evidence Obtained by Electronic Surveillance [#31] be denied, Defendant Crowder's Motion to Discover and Suppress Evidence Obtained as a Result of August 31, 2008 Search and Seizure [#49] be granted, and Defendant Crowder's Motion to Suppress September 3, 2008 Search and Seizure

[#53] be denied.

I. FINDINGS OF FACT

FBI Special Agent Christopher Langert, St. Paul Police Commander David Korus, and St. Paul Police Officer David Langfellow testified at the October 22, 2008 criminal pretrial motion hearing in this matter.

A. Background

FBI Special Agent Christopher Langert has worked for the FBI for ten and a half years and is the principal case agent on the FBI's Domestic Terrorism Squad. In preparation for the 2008 Republican National Convention (RNC) in St. Paul, Minnesota, the FBI, the St. Paul Police Department, and other federal and local agencies established an information sharing center (IOC) at Fort Snelling in Minneapolis. The investigation into threats against the RNC began approximately a year before the RNC, and included investigation into an Austin-based group the FBI called the Austin Affinity Group. Defendant Crowder and Defendant McKay were first mentioned as group members in FBI reports in February 2008. SA Langert testified that the FBI first learned Defendants Crowder and McKay were manufacturing lightweight defensive shields out of highway barrels and plexiglass on April 24, 2008. According to intelligence reports, the defendants planned to bring the shields to the Twin Cities for the RNC to defend themselves against law enforcement during protests. SA Langert testified that a confidential informant, referred to as the "Texas informant," attended group meetings and relayed information to the FBI. The Texas informant was deemed highly reliable based on past information and was working with an FBI "handling agent" based in Austin. Defendant McKay and Defendant Crowder were constructing shields by cutting orange highway barrels in half and adding

plexiglass “viewports” affixed with screws that protruded through the outside of the shield.¹ SA Langert testified that these screws were to be used as an offensive weapon against law enforcement, although nothing was done to the screws to make them sharper or more dangerous. The defendants also tested the shields for ballistic resistance to non-lethal weapons.

On August 28, 2008, a member of the defendants’ group, Esteban Tovar, rented a 12-passenger van to transport the group from Texas to Minnesota.² On August 29, 2008, Mr. Tovar rented a U-Haul trailer to transport the shields and other items.³ SA Langert testified he believed Defendant McKay and Defendant Crowder placed the shields in the trailer. The defendants, accompanied by the Texas informant, rode with the group in the van from Texas to Minnesota. SA Langert testified that law enforcement did not know how many individuals rode in the van, the exact date the van left Texas, who drove the van, or who kept the keys to the van. The van and trailer arrived in Minnesota on August 30, 2008. At some point between August 30, 2008 and August 31, 2008 the van and trailer were separated.

SA Langert testified the FBI was concerned that agents would not be able to interdict the shields before defendants could use them. The FBI reported to the IOC that the trailer would be arriving in Minnesota and that law enforcement should be on the lookout for it. Members of the IOC, including the Minnesota State Patrol and the St. Paul Police Department were looking for the trailer on August 30 and 31, 2008.

B. St. Paul Police Conduct Warrantless Search of the U-Haul Trailer

St. Paul Police Commander David Korus has been a police officer for 26 years and currently supervises St. Paul police investigative units. He is the Co-Chair of the Counter-

¹ Government Ex. 2 and 2-A.

² Government Ex. 1, Van Rental Agreement.

³ Government Ex. 1-A, U-Haul Trailer Rental Agreement.

terrorism Subcommittee of the Joint Terrorism Task Force (JTTF). During the lead-up to the RNC, he was constantly briefed on threats coming into St. Paul. St. Paul Police Officer David Langfellow has been a police officer for 20 years. He was assigned to the JTTF on June 1, 2008 and was working with SA Langert as partners.

Commander Korus testified that the St. Paul Police were in “disruption mode” on August 31, 2008, meaning that they were trying to ensure that all weapons would be removed from the area around the Republican National Convention as quickly as possible. Officer Langfellow testified that it was a chaotic time, and Korus testified that there were “lots of things going on at the same time.” Commander Korus was advised on August 31, 2008 that the trailer was in town, and gave orders for officers to try to find the trailer. Commander Korus and Officer Langfellow testified that although they were not able to recall specifics, various agencies were searching for the trailer on the 30th and 31st and officers had spotted and lost the trailer several times.

During the day of August 31, 2008, the Texas informant told the FBI that the trailer was at an address on Woodbridge St. in St. Paul, Minnesota, where some of the Texas group members were staying. The Texas informant told the handling agent the defendants planned to move the contents of the trailer, but that the informant did not know when the group planned to make the move. The FBI shared the trailer’s location with the IOC, and the St. Paul police were alerted. Officer Langfellow testified that a St. Paul Police sergeant went to the Woodbridge address and located the trailer, described as a small U-Haul trailer with writing on the side. He reported this information to Officer Langfellow. Officer Langfellow testified that the sergeant had to leave the area to respond to another call, and that because other officers were unavailable, the trailer was left unattended at the Woodbridge address for approximately two hours until Officer Langfellow arrived on scene at 3:00 p.m. on August 31, 2008.

Officer Langfellow testified he found the trailer parked in an alley behind the Woodbridge address. He checked the front and back of the house, and then left the residence because he was by himself in an unmarked vehicle. He called two other patrol cars for backup, and circled the surrounding blocks for 15 to 20 minutes, checking out the neighborhood. Officer Langfellow testified he did not see anyone in the house or anyone in the neighborhood near the house or the trailer, and he did not see anything that caused him to worry that someone might be accessing the trailer.

Officer Langfellow notified Commander Korus that he found the trailer, and testified that Korus told him to “disrupt the trailer.” Commander Korus testified that he told Officer Langfellow that “whatever was in trailer I didn’t want it in St. Paul.” Commander Korus testified that he did not tell Officer Langfellow to get a warrant, that he told the officers to just “deal with [the trailer],” and that per his usual policy he delegated decision-making authority to the officers on scene. Officer Langfellow testified he interpreted Commander Korus’s directive to mean he should open the trailer immediately, in part because the St. Paul police were in disruption mode, not investigative mode. When Officer Langfellow cut the lock off the trailer, he found 34 homemade shields with 34 sets of web gear, five helmets, a medic bag, and a number of batons that looked like cut-off shovel handles.⁴ Commander Korus testified he told Officer Langfellow to put the trailer contents in secured police storage.

C. Law Enforcement Executes Search Warrant for the Dayton Avenue Residence

Upon arriving in Minnesota, Defendant Crowder and Defendant McKay became guests at the third-floor unit of the Dayton Avenue residence in St. Paul. The building is a house converted into three apartments with shared outdoor and basement areas. The basement was

⁴ Government Ex. 2-A.

open to all persons staying in the house; it has laundry machines and storage for all residents. Commander Korus testified that the basement is accessible from the third-floor apartment by an indoor staircase.

SA Langert testified Defendant Crowder stayed in the third-floor apartment for at least the night of August 31, 2008, and that there was no indication Defendant Crowder stayed anywhere else except in police custody while in Minnesota. Defendant Crowder was arrested during a protest in downtown St. Paul on September 1, 2008. He was carrying only his personal possessions – the clothing he was wearing and a cell phone. Defendant McKay was an overnight guest at the Dayton Avenue residence from at least August 31, 2008 until the early morning hours of September 3, 2008. SA Langert testified that the defendants had access to a key for the apartment building and third-floor apartment.

A search warrant for the third-floor living space and common areas of the Dayton Avenue residence, St. Paul, Minnesota was issued at 3:43 a.m. on September 3, 2008 based on surveillance of individuals coming out of the Dayton Avenue residence and engaging in riotous activities.⁵ SA Langert and other FBI agents were conducting surveillance on the residence in the hours preceding the execution of the search warrant. SA Langert testified he first learned group members at the Dayton Avenue residence had made Molotov cocktails when the second FBI informant in this case, the “Minnesota informant,” agreed to wear an audio and video recording device that recorded conversations with Defendant McKay on September 1, 2008. No

⁵ Government Ex. 3. Officer Langfellow testified that his name is mistakenly on the search warrant affidavit because he was originally intended to be the affiant. However, the SWAT commander in charge of the operation decided during the process that the warrant needed to be re-written. Sergeant Jane Laurence became the affiant, but Officer Langfellow’s name was mistakenly left in the affidavit.

conversations with Defendant Crowder were recorded. Defendant Crowder was in jail during the time of the Minnesota informant's electronic surveillance.⁶

Law enforcement was conducting surveillance on September 2, 2008 and September 3, 2008 because of information from the Texas informant that Defendant McKay was going to use the Molotov cocktails during that time frame. Defendant McKay planned to firebomb law enforcement vehicles in a nearby parking lot that the U.S. Secret Service was using to search vehicles going into the RNC venue. SA Langert testified that the FBI and other law enforcement were conducting surveillance at the Dayton Avenue residence on and off from late in the evening of September 2, 2008 until in the morning of September 3, 2008. The FBI was in contact with the Texas informant via the Austin handling agent, who then passed information along to SA Langert. Also during that time, the Texas informant had a conversation with Defendant McKay while wearing a secret transmitter device. SA Langert testified that he and three other FBI agents were listening in when Defendant McKay told the Texas informant that he was in possession of Molotov cocktails. The Texas informant was invited to participate in the firebombing of the parking lot, and believed the Molotov cocktails were in the basement of the Dayton Avenue residence.

SA Langert testified that at approximately 1 or 1:30 a .m. on September 3, 2008 Defendant McKay sent a coded text message to the Texas informant. Defendant McKay texted that there were "amps" (meaning cops) all over the "candybars" (meaning the Molotov cocktails) so it was too hot to "go to someone's house" (meaning use the Molotovs) and that they would reassess in an hour.

⁶ The Court finds that the Defendant McKay has abandoned his motion to suppress evidence obtained by electronic surveillance in this matter [#31] as the surveillance issue was not mentioned in his supplemental memorandum. The motion must therefore be denied.

Law enforcement executed the search warrant at 5 a.m. on September 3, 2008. Eight Molotov cocktails were found in the basement of the Dayton Avenue residence.⁷

D. Defendant McKay's September 3, 2008 Statement

Commander Korus testified that Defendant McKay was in the third-floor apartment at the time the search warrant was executed. After the fire department removed the Molotov cocktails, Commander Korus went to the third-floor apartment and found Defendant McKay in one of the bedrooms. He was sitting on a bed, wearing flexcuffs and a blanket. Commander Korus testified he told Defendant McKay he would be going to jail and that law enforcement had to remove people from the house. Defendant McKay asked to get dressed, and Commander Korus helped him get dressed. Commander Korus did not read Defendant McKay the Miranda warning. After Defendant McKay was dressed, Commander Korus asked him questions about where his possessions were among the items in the room. No other officers were present. Using his head, Defendant McKay showed Commander Korus what was his – a black backpack, a futon, and a nice 35mm camera. The black backpack was later found to contain evidence, including a stick lighter, an eye-cleaner container with flammable liquid inside, bolt cutters, and a box of tampons.⁸ Commander Korus testified that at the time he asked Defendant McKay to indicate his possessions, Commander Korus did not know that the backpack contained evidence.

E. The September 4, 2008 Interrogation of Defendant McKay

SA Langert and Officer Langfellow interrogated Defendant McKay at the Ramsey County Jail on September 4, 2008. At the time of the interrogation, Defendant McKay was in custody but was not yet charged with a federal crime. The first portion of the interrogation was recorded by Officer Langfellow, but at some point his digital audio recorder malfunctioned, and

⁷ Government Ex. 7C and 7D.

⁸ Government Ex. 4.

as a result Officer Langfellow failed to record the entire interrogation. SA Langert did not have a separate audio recorder. SA Langert testified that the partial transcript of the interrogation is accurate as to the first part of the questioning in which Defendant McKay was given an advice of rights form to read and sign.⁹ SA Langert and Officer Langfellow witnessed Defendant McKay signing the form, and SA Langert testified that Defendant McKay seemed to understand his rights, seemed intelligent, and asked relevant questions about the form before signing. The following is a portion of the taped interrogation¹⁰:

SA Langert: Not that you'll agree with what we're doing and believe it or not even Brad now sees that the best thing to do is help out. So I'm going to give you that opportunity. Since you're in custody, ah, you haven't been released yet, I have to show you this form here. I'd like you just to take a look at that advice of rights form.

Def. McKay: Kay.

SA Langert: The big thing I want you to take away from this after you read it is that, even if you decide to talk start talking to us and listen to what we have to say and all that, you can stop talking at any time. It's not like once you sign it you've given away your rights to stop. And a lot of people sometimes don't understand that.

Def. McKay: Ok, I'm still really confused on what I'm even being held for.

SA Langert: I, you know what, that's completely understandable and, and we're not here to talk to you too much about what you're being, what you're physically here right now for from what happened in the street. There's a completely separate incident that we're here to talk to you about but I can't really get into it more than that until we're ready to talk together.

Def. McKay: But if I sign this I don't need to talk to but I can communicate with you guys.

⁹ Government Ex. 5. The form, entitled "ADVICE OF RIGHTS," reads: "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time." Above the signature line, the form reads: "I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present."

¹⁰ Government Exs. 6 and 6-A. The Court has reviewed the audio recording of this portion of the interview and finds that the transcript and SA Langert's testimony is consistent with what transpired on the audio recording.

SA Langert: Absolutely.
Def. McKay: Is that what that means?
SA Langert: Absolutely. If you sign this, you can talk if you want, communicate with us if you want, or stop talking at anytime.
Def. McKay: Ok.
SA Langert: That's all this says.
Def. McKay: But it's also, everything that I say can be used against me in a court of law.
SA Langert: Yes it can.
Def. McKay: Ok.
SA Langert: Absolutely.
Def. McKay: Ok.
SA Langert: All right.

SA Langert testified Defendant McKay did not have his rights read out loud to him and that Defendant McKay reviewed the advice of rights form on his own. SA Langert testified that Defendant McKay did not ask any other questions about the form other than those contained in the transcript, although he did ask other questions related to his status and the possible consequences. SA Langert testified that neither he or Officer Langfellow threatened Defendant McKay in any way or promised him anything in return for cooperating, although SA Langert testified that he told Defendant McKay of his experience that people who cooperate with law enforcement generally do better within the criminal justice system. Defendant McKay did not ask for a lawyer and did not ask for the interrogation to be stopped. During the interrogation, Defendant McKay made admissions about the manufacturing and possession of Molotov cocktails.

II. CONCLUSIONS OF LAW

A. The St. Paul Police's Warrantless Search of the U-Haul Trailer Was Illegal Under the Fourth Amendment

Defendant McKay and Defendant Crowder seek suppression of all evidence collected from the U-Haul trailer because the St. Paul police's warrantless search was prohibited by the Fourth Amendment. The Government first contends that the Defendants lack standing to challenge the search of the U-Haul. In the alternative, the Government asserts that the search was conducted upon probable cause and fell within the "automobile exception" and/or the "exigent circumstances" exception to the Fourth Amendment.

1. The Defendants Have Standing to Challenge the Search and Seizure of the Trailer

The test for whether a defendant has standing to claim the protection of the Fourth Amendment is whether the defendant has a legitimate expectation of privacy in the place searched. *Rakas v. Illinois*, 436 U.S. 128, 143 (1978). A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. *Id.* at 143-44. It is the defendant's burden to establish a reasonable expectation of privacy in the premises searched. *United States v. Pierson*, 219 F. 3d 803, 806 (8th Cir. 2000). However, standing to challenge the constitutionality of a search or seizure does not depend upon a property right in the place searched. *Katz v. U.S.*, 389 U.S. 347, 361 (Harlan, J., concurring). As a locked, windowless container, an expectation of privacy has been recognized in a trailer. *United States v. Jenkins*, 92 F.3d 430, 435 (6th Cir. 1996) ("Most of the time, the trailer is locked up against the outside world – and is opened only when it is being loaded or unloaded. In this sealed, locked space, there might be any number of perfectly legitimate items."); *cf. Texas v. Brown*, 460 U.S. 730, 740 (1983) (general public could peer into automobile, therefore no legitimate expectation of privacy). Factors relevant to the determination of standing include: ownership; possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or

nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case. *Pierson*, 219 F. 3d at 806.

In this case, defendants were active members of a group who manufactured the majority of the items in the trailer, owned the items in the trailer, placed the items in the trailer, took steps to prevent the items from being stolen by locking the trailer, rode in the van that pulled the trailer from Texas to Minnesota, and were likely involved in parking the trailer at the Woodbridge address. The locked trailer had no windows or any other way for the public to see inside.¹¹ Defendants had a legitimate expectation of privacy in the trailer as owners of property within the trailer, as members of the group that rented the trailer, as individuals with significant historical use of the trailer and its contents, and as individuals with the ability to regulate access to the trailer. Furthermore, it is objectively reasonable for Defendants to have had an expectation of privacy in a locked, windowless trailer and Defendants argue they did have a subjective anticipation of privacy in the sealed container. Therefore, Defendants have standing to protest the warrantless search and seizure of the trailer.

2. *The Warrantless Search of the Trailer was Illegal And Did Not Fall Within the “Automobile Exception” or the “Exigent Circumstances Exception” to the Fourth Amendment*

The Fourth Amendment warrant requirement “is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part of any system of law enforcement.” *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). A container which can support a reasonable expectation of privacy may not be searched, even on probable cause,

¹¹ Government Ex. 2, 2-A.

without a warrant. *United States v. Jacobsen*, 466 U.S. 109, 120 n.17 (1984) (citing *United States v. Chadwick*, 433 U.S. 1 (1977)). In *Chadwick*, the Supreme Court held that a warrantless search of a movable container – a footlocker – violated the Fourth Amendment even though probable cause existed to believe that the footlocker contained contraband. 433 U.S. 1 (1977). The *Chadwick* Court held that there are greater privacy interests associated with containers than with automobiles, in part because a person’s expectation of privacy in sealed containers is substantially greater than the expectation of privacy in automobiles “where both its occupants and its contents are in plain view.” 433 U.S. at 12-13; *see also California v. Carney*, 471 U.S. 386, 405, n.18 (1985) (Stevens, J. dissenting) (“The Court in *Chadwick* specifically rejected the argument that the warrantless search was “reasonable” because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles.”).

In *Jacobsen*, the Court clearly stated that it would be a violation of the Fourth Amendment for police to “simply learn from a private party that a container contains contraband, seize it from its owner, and conduct a warrantless search.” 466 U.S. at 119 n.17. *Jacobsen* involved a FedEx package that police searched and seized without a warrant after private parties (FedEx employees) had compromised the container’s legitimate expectation of privacy by opening the package and displaying the contraband to police. *Id.* at 114-15. Although the *Jacobsen* search was deemed constitutional because private parties had compromised the privacy interests in the container, the Court explicitly distinguished a situation like the instant case, wherein a legitimate expectation of privacy existed in a container or package subjected to a warrantless search. *Id.* at 119-122, 129.

At the time of the search, the trailer in the instant case was unconnected to any means of locomotion. The trailer was incapable of being moved from its stationary location, unless and

until someone connected it to a vehicle capable of pulling it. Under these circumstances, the trailer is more like the footlocker in *Chadwick* or the sealed FedEx package in *Jacobsen* (before the package was compromised) than it is like an automobile. The Court rejects the Government's contention that the search of this stationary, locked trailer is governed by the automobile exception to the warrant requirement. The stationary trailer, like a footlocker or a wrapped package, is a readily mobile sealed container with contents protected from public view.¹² Automobiles, in contrast, generally have two large windshields and side windows, leaving the interior very much open to public view. Moreover, automobiles are primarily used for locomotion, not storage. During the hours that the U-Haul trailer in this case was sitting unconnected to a means of locomotion, it was functioning as a storage container.

The automobile exception to the warrant requirement was first set forth in *Carroll v. United States*, 267 U.S. 132 (1925), and allows police to conduct a warrantless search of an automobile when they have probable cause to believe it contains contraband or evidence of criminal activity. *See, e.g., California v. Carney*, 471 U.S. 386, 390 (1985). The underlying rationale of the automobile exception is the ready mobility of automobiles and the decreased expectation of privacy in them. *Id.*; *United States v. Blaylock*, 533 F. 3d 922, 927 (8th Cir. 2008). While the automobile exception has been extended to other self-propelled vehicles,

¹² It is important to note that this case is distinguishable from the *Ross-Acevedo* line of cases in which containers *inside* automobiles can be searched without a warrant upon probable cause. In *United States v. Ross*, 456 U.S. 798 (1982), and in *California v. Acevedo*, 500 U.S. 565 (1991), the Court repudiated a line of cases that had required police to get a warrant before searching any closed containers found inside of automobiles that were being searched without a warrant pursuant to the automobile exception. The *Acevedo* court was particularly careful to limit its holding to containers found inside of automobiles. There is nothing in the *Ross-Acevedo* line of cases that in any way overrules *Chadwick's* refusal to extend the automobile exception to a footlocker that was not inside an automobile at the time it was searched. Here, the container was outside of any automobile and was sitting alone away from any potential means of locomotion.

including in some circumstances to mobile homes, the Court is unaware of it being extended to a stationary trailer that has been disconnected from any means of locomotion. Its disconnection from locomotion is one thing that distinguishes the instant case from *United States v. Bozada*, the case the Government cites for the proposition that the automobile exception extends to trailers. 473 F. 2d 389 (8th Cir. 1973). The trailer in *Bozada*, unlike the trailer here, was hooked up to a means of locomotion (a tractor). *Id.* at 390-91. More importantly, *Bozada* involved exigent circumstances – a separate, free-standing exception to the Fourth Amendment warrant requirement. *Id.* Exigent circumstances exist when there is probable cause for a search or seizure and the evidence sought is in imminent danger of destruction, the safety of law enforcement officers or the general public is threatened, or the police are in “hot pursuit” of a suspect. *See, e.g., Pierson*, 219 F. 3d at 806 (no exigent circumstances because officers had no basis for belief that evidence would be destroyed); *United States v. Uscanga-Ramirez*, 475 F.3d 1024, 1028-29 (8th Cir. 2007) (exigent circumstances because upset defendant locked in room with gun); *United States v. Schmidt*, 403 F. 3d 1009, 1014-15 (8th Cir. 2005) (exigent circumstances because officer in hot pursuit of suspect). In contrast, in the instant case there were no exigent circumstances. Officer Langfellow testified that the trailer was left unattended for two hours before he arrived at the scene. Further, law enforcement knew about the existence of the trailer and its contents for at least a day and half before the trailer was located – ample time to seek a warrant. The situation was not analogous to any of the examples cited above, where it would be impractical to obtain a warrant before proceeding with the search.¹³ For these

¹³ Commander Korus and Officer Langfellow testified that, due to the commotion surrounding the RNC, the police were in “disruption mode,” not investigative mode, and it was therefore imperative to search the trailer immediately. The Court finds that the law does not recognize a distinction between disruption mode and investigation mode. Law enforcement, in whatever situation, must act lawfully. Law enforcement is required at all times to comply with the Constitution regardless of whether it is seeking to disrupt potentially unlawful activities or to

reasons, the court rejects the Government's contention that exigent circumstances prevented it from complying with the Fourth Amendment's warrant requirement.

The search of the U-Haul was conducted without a warrant. No exception to the Fourth Amendment's warrant requirement applies. The evidence found as a result of the search must be suppressed.

B. The September 3, 2008 Search of the Basement of the Dayton Avenue Residence Properly Fell Within the Scope of the Search Warrant

Defendants seek suppression of all evidence collected from the search of the basement of the Dayton Avenue residence because the officers exceeded the scope of the search warrant. The Government argues first that neither defendant has standing to challenge the search and second that search of the basement did not exceed the scope of the search warrant. Both Defendant McKay and Defendant Crowder assert they have standing to challenge the search and that the search of the basement fell outside of the scope of the search warrant for "common areas."¹⁴

1. Defendant McKay and Defendant Crowder Have Standing to Challenge the Search

The test for whether a defendant has standing to claim the protection of the Fourth Amendment is whether the defendant has a legitimate expectation of privacy in the place searched. *Rakas v. Illinois*, 436 U.S. 128, 143 (1978). A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. *Id.* At 143-44. The

investigate crimes for later prosecution. Evidence seized in violation of the Fourth Amendment is inadmissible. In deciding to apply the exclusionary rule to the states through the due process clause of the 14th Amendment, Justice Clark observed, "Our decision today, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

¹⁴ Government Ex. 3.

Supreme Court has recognized that an overnight guest has a legitimate expectation of privacy in her host's residence. *Minnesota v. Olson*, 495 U.S. 91, 99-100 (1990). An overnight guest seeks shelter in a friend's home precisely because it provides him with privacy, and when the host is away or asleep, the guest has a measure of control over the premises. *Id.* at 99.

Defendant McKay was concededly an overnight guest at the third-floor apartment of the Dayton Avenue residence from August 31, 2008 until his arrest on September 3, 2008.

Residents of all apartments in the building had access to the basement and outdoor common areas. As a guest, especially a guest with access to a key, Defendant McKay had access to the basement and common areas of the building in the same way as he had access to the third-floor apartment. There is evidence that Defendant McKay possessed Molotov cocktails, and Molotov cocktails were found in the basement. Defendant McKay had a legitimate expectation of privacy in the basement of his host residence, and therefore has standing to challenge the search.

Defendant Crowder was an overnight guest at the Dayton Avenue residence for at least the night of August 31, 2008. He had access to a key to the apartment, which included access to the basement. Although he was arrested on September 1, 2008 and was in police custody at the time of the search, there is no indication that Defendant Crowder did not remain an overnight guest at the Dayton Avenue residence for purposes of the Fourth Amendment standing requirement. Presumably, had the police released him from custody, he could have returned to the Dayton Avenue residence to stay for the remainder of the RNC. Further, Defendant Crowder was arrested carrying only his cell phone and the clothes he was wearing, an indication that his other possessions likely remained at the Dayton Avenue residence. Therefore, Defendant Crowder had a legitimate expectation of privacy in the basement the Dayton Avenue residence and has standing to challenge the search.

2. *The Officers Legally Searched the Basement of the Dayton Avenue Residence Under the Authorization of the Search Warrant*

The Defendants argue that the officers exceeded the scope of the search warrant authorization by searching the basement. The Warrant Clause of the Fourth Amendment prohibits the issuance of any warrant except one “particularly describing the place to be searched.” U.S. Const. amend. IV. Here, the search warrant particularly described the Dayton Avenue residence “third floor living space and common areas.”¹⁵ The basement of the Dayton Avenue residence was open to all residents and included a common laundry and storage space. The basement space was commonly used by all residents and falls within the scope of the term “common areas.” Therefore, the search of the basement of the Dayton Avenue residence was properly authorized by the search warrant. As the warrant particularly described the place to be searched, the evidence found in the basement is admissible and the motions to suppress it must be denied.

C. The Government Failed to Meet Its Burden to Establish That Defendant McKay Voluntarily, Knowingly, and Intelligently Waived His Miranda Rights Prior to Making September 3, 2008 Statements.

Defendant McKay seeks to suppress the statements obtained by Commander Korus on September 3, 2008 because they were obtained in violation of his rights under *Miranda v. Arizona*. 384 U.S. 436 (1966). The Government argues that the absence of the *Miranda* warning is not a basis for suppression because the record is clear that Commander Korus’s questions about Defendant McKay’s possessions were not designed to elicit an incriminating response.

¹⁵ Government Ex. 3.

For a Defendant's statement to require the protection of *Miranda*, the statement must be made while the defendant is in custody and must be made in response to interrogation. 384 U.S. at 444 (1966). Under *Miranda*, a suspect in custody must be informed of his Fifth Amendment rights that (1) he has the right to remain silent, (2) anything he says can be used against him as evidence, (3) he has a right to an attorney before and during questioning, and (4) if he cannot afford an attorney one will be appointed for him. *Id.* at 479. *Miranda* requires a that a Defendant's waiver of his Fifth Amendment rights must be "made voluntarily, knowingly and intelligently." *Id.* at 444. "A waiver is knowing if it is 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *United States v. Syslo*, 303 F.3d 860, 865 (8th Cir. 2002) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). An incriminating response means any response that the prosecution may seek to introduce at trial, and thus any practice that the police should know is reasonably likely to evoke an incriminating response amounts to interrogation. *Id.* at 301-02, n.7.

When Commander Korus asked Defendant McKay to point out his possessions, Defendant McKay was wearing flexcuffs. Thus, Defendant McKay was clearly in custody. Commander Korus's question, while perhaps not specifically intended to elicit an incriminating response, was certainly likely to lead to a response that the prosecution might seek to introduce at trial. Commander Korus should have known that Defendant McKay's personal belongings were likely to become evidence that the prosecution might seek to introduce at trial, and his

statement identifying his belongings would likely be introduced by the prosecution to link Defendant McKay to the incriminating evidence. Questions about which possessions belonged to Defendant McKay out of the many items in what Commander Korus described as “congested” living quarters are not routine questions normally attendant to arrest and custody, such as questions about the name and address of a suspect. *Rhode Island*, 446 U.S. at 301; *see also United States v. Lockett*, 393 F. 3d 834, 837 (8th Cir. 2005)). Therefore, Commander Korus’s questions amounted to custodial interrogation, and Defendant McKay’s statements were obtained in violation of his *Miranda* rights. Defendant McKay’s September 3, 2008 statements must be suppressed.¹⁶

D. The Government Has Met Its Burden to Establish That Defendant McKay Voluntarily, Knowingly, and Intelligently Waived His Miranda Rights Prior to Making September 4, 2008 Statements To SA Langert

Defendant McKay seeks to suppress statements he made to SA Langert on September 4, 2008 because the statements were not made after a voluntary, knowing, and intelligent waiver of his rights under *Miranda*. 384 U.S. at 444. The Government argues that the record does not support this claim because McKay read a written *Miranda* warning on an advice of rights form and asked pertinent, intelligent questions about the warning before signing the form.¹⁷

Defendant McKay asserts that his waiver was not voluntary, knowing, and intelligent because the *Miranda* warning was not read to him orally. Based on the advice of rights form, audio recording and transcript of SA Langert’s September 4, 2008 interrogation of Defendant McKay,

¹⁶The belongings themselves are admissible. Only the statement identifying it must be suppressed. The belongings were clearly subject to search pursuant to the search warrant. Moreover, the belongings are not unlawful “fruits” of the custodial interrogation. *See, United States v. Patane*, 542 US 630, 643 (2004).

¹⁷ Government Exs. 5, 6, and 6-A.

it is clear that Defendant McKay's statements were made after a voluntary, knowing, and intelligent waiver of his *Miranda* rights. The statements must therefore be allowed as prosecution evidence.

III. RECOMMENDATION

Based upon all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED** that Defendant McKay's Motion

1. To suppress Statements [#29] be **GRANTED** as to the statement made on September 3, 2008 to Commander Korus, and **DENIED** as to the statement made on September 4, 2008 to Special Agent Langert;
2. To suppress Evidence Obtained in Illegal Search [#30] be **GRANTED** as to the evidence found in the U-Haul trailer, and **DENIED** as to the evidence found at the Dayton Avenue residence;
3. For Disclosure and Suppression of Evidence Obtained by Electronic Surveillance [#31] be **DENIED**.

Based upon all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED** that Defendant Crowder's Motion

1. To Discover and Suppress Evidence Obtained as a Result of August 31, 2008 Search and Seizure [#49] be **GRANTED**;
2. To Suppress September 3, 2008 Search and Seizure [#53] be **DENIED**.

DATED: November 17, 2008

s/ Franklin L. Noel
FRANKLIN L. NOEL
United States Magistrate Judge

Pursuant to the Local Rules, any party may object to this Report and Recommendation by filing with the Clerk of Court and serving on all parties, on or before **December 5, 2008**, written objections which specifically identify the portions of the proposed findings or recommendations to which objection is being made, and a brief in support thereof. A party may respond to the objecting party's brief within ten days after service thereof. All briefs filed under the rules shall be limited to 3,500 words. A judge shall make a de novo determination of those portions to which objection is made.

Unless the parties are prepared to stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendation, the party making the objections shall timely order and cause to be filed by December 5, 2008 a complete transcript of the hearing.

This Report and Recommendation does not constitute an order or judgment of the District Court, and it is, therefore, not appealable to the Circuit Court of Appeals.