UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RHONDA FIRESTACK-HARVEY, LARRY HARVEY, MICHELLE GREGG, ROLLAND GREGG, and JASON ZUCKER,

Defendants.

No. CR-13-24-FVS

ORDER DENYING THE DEFENDANTS' MOTION TO SUPPRESS FIREARMS

THE DEFENDANTS have filed a number of motions. The Court considered their motions at a pretrial conference that was held on April 22 and 23, 2014. This order addresses the defendants' motion to suppress firearms that were seized by law enforcement officers despite the fact the firearms were not listed in a search warrant.

BACKGROUND

On August 8, 2012, Stevens County Sheriff's Detective Loren A. Erdman asked a state superior court judge to authorize law enforcement officers to search a residence, buildings, and property that are located at 939 Clugston-Onion Creek Road, Colville, WA. Detective Erdman submitted an affidavit and a proposed search warrant to the judge. On pages 10 and 11 of his "Affidavit for Search Warrant," Detective Erdman listed the evidence he was seeking. He listed the same evidence in the "Search Warrant." Neither the affidavit nor the

search warrant listed firearms as evidence to be searched for.[1] On August 9, 2012, law enforcement officers drove to 939 Clugston-Onion Creek Road. They arrived at the front door of the residence at 10:47 a.m. Rhonda Firestack-Harvey was present. She admitted the officers and they searched the residence. At this juncture, the Court has only a sketchy description of what occurred during the course of the search. One of the rooms the officers searched was the den. In it, the officers allegedly discovered marijuana, a scale, packaging material, records of drug transactions, and two firearms. One of the firearms was a rifle. The other was a shotgun. Both allegedly were loaded. The den was not the only room the officers searched. There are at least two bedrooms in the residence. Officers searched both. In the master bedroom, they allegedly found a loaded pistol in a dresser drawer. (They also may have found two loaded rifles in the master bedroom, but the record is unclear.) Apparently, there was no evidence of drug-trafficking in the master bedroom. There is a second bedroom in the residence. In it, officers allegedly found marijuana and three firearms. One of the firearms was an unloaded pistol. It was lying in a box, together with a loaded, clip-style magazine. Another firearm was a shotgun. A third was a "black powder" rifle. Officers seized all of the firearms they observed. The defendants move to suppress the firearms on the ground they were not listed in the search warrant as things the officers were entitled to search for and seize.

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[1]The parties have filed several copies of the affidavit and search warrant. *See, e.g.*, ECF No. 214, Exhibits "B" and "C."

STANDARD

The Fourth Amendment provides in part, "[N]o Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The requirement of particularity is a critical component of the Warrant Clause. Almost 100 years ago, the Supreme Court observed that particularity in search warrants "prevents the seizure of one thing under a warrant describing another." *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927). More recently, the Supreme Court reiterated the importance of the particularity requirement:

> By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Horton v. California, 496 U.S. 128, 140 n.10, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112 (1990) (quoting *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987)).

PARTIES' POSITIONS

The United States argues the warrantless seizure of firearms at 939 Clugston-Onion Creek Road on August 9, 2012, was lawful under the plain view doctrine. *See, e.g., Horton*, 496 U.S. at 136-37, 110 S.Ct. 2301. Pursuant to the "plain view" doctrine, an officer who encounters incriminating evidence while executing a search warrant may seize the evidence, despite the fact it was not listed in the search

warrant, if three circumstances exist: First, the officer was standing in a place he was entitled to be when he first observed the evidence. Second, the incriminating character of the evidence was immediately apparent. Third, the officer had a lawful right of access to the evidence. *See, e.g., United States v. Wong*, 334 F.3d 831, 838 (9th Cir.2003).

Mr. Harvey seems to concede the United States can establish the first and third elements of the plain view doctrine. It is the second element upon which he focuses. He denies the incriminating character of the evidence was immediately apparent. Mr. Harvey maintains an objective law enforcement officer who stood in the shoes of the officers who searched 939 Clugston-Onion Creek Road on August 9, 2012, would have realized the persons who were cultivating the marijuana plants were attempting to comply with the Washington State Medical Use of Cannabis Act ("MUCA"), chapter RCW 69.51A. In Mr. Harvey's opinion, an objective officer would have had no reason to think the firearms were evidence of criminal activity.

RULING

Law enforcement officers lawfully entered the residence at 939 Clugston-Onion Creek Road pursuant to a warrant authorizing them to search for evidence indicating the occupants were involved in manufacturing marijuana. The officers knew approximately 70 marijuana plants were growing in a field outside the residence. While searching the residence, the officers observed a scale, packaging material, processed marijuana, and records of transactions. Based upon their observations, the officers reasonably could have inferred the persons

who were growing the marijuana plants at 939 Clugston-Onion Road were engaged in drug trafficking. The officers observed a number of firearms while searching the residence. The search warrant did not authorize the officers to seize firearms. Nevertheless, a warrantless seizure of the firearms was constitutional pursuant to the plain view doctrine. For one thing, the officers were engaged in a lawful search of the residence when they observed the firearms. For another thing, they observed the firearms while searching places in which they reasonably believed they might locate items that were listed in the search warrant. Finally, the incriminating character of the firearms was immediately apparent. Firearms are closely associated with drug trafficking. Drug traffickers frequently arm themselves in order to protect their operations. *See United States v. Savinovich*, 845 F.2d 834, 838 (9th Cir.1988). Thus, the officers had an objectively reasonable basis for concluding the firearms in the residence were evidence of drug trafficking. Since the evidentiary value of the firearms was immediately apparent, since the officers observed the firearms from lawful vantage points, and since the officers were authorized to search the residence, the officers' warrantless seizure of the firearms was objectively reasonable under the Fourth Amendment. *See United States v. Ewain*, 88 F.3d 689, 693-695 (9th Cir.1996).

Mr. Harvey places great weight upon the fact the search of 939 Clugston-Onion Creek Road was accomplished by state law enforcement officers who were looking for evidence of violations of state law based upon a warrant that had been issued by a state judicial officer. All of that may be true, but it is also beside the point. Mr. Harvey

is urging a federal court to exclude evidence from a federal criminal action pursuant to the exclusionary rule. The issue is whether the officers' actions were reasonable within the meaning of the Fourth Amendment. *See Fernandez v. California*, ––– U.S. ––––, 134 S.Ct. 1126, 1131, ––– L.Ed.2d –––– (2014). This Court must determine whether the circumstances, "viewed objectively," justify the officers' actions. *Ashcroft v. al-Kidd*, 563 U.S. ––––, ––––, 131 S.Ct. 2074, 2081, 179 L.Ed.2d 1149 (2011) (internal punctuation and citations omitted). The officers' subjective thoughts as they executed the search warrant are irrelevant. *Id.* at ----, 131 S.Ct. at 2081. It doesn't matter whether they thought about federal law while they searched 939 Clugston-Onion Creek Road. The issue is whether their actions were objectively reasonable under the Fourth Amendment. As explained above, the officers' actions were reasonable. Consequently, based upon the information that has been presented, the disputed firearms are not subject to exclusion from the defendant's trial pursuant to the Fourth Amendment.

IT IS HEREBY ORDERED:

Lester Harvey's "Motion to Suppress Evidence" (**ECF No. 214**) is **denied**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 28th day of April, 2014.

s/ Fred Van Sickle
Fred Van Sickle
Senior United States District Judge