

selected as a Decision of Interest

**United States v. Edgar Matos, 07-CR-870**  
**Decided: September 23, 2008**

District Judge Nicholas G. Garaufis

U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**Judge Garaufis**

**MEMORANDUM & ORDER**

Edgar Matos ("Matos" or "Defendant") is charged with knowing and intentional possession of 500 grams or more of cocaine with intent to distribute under 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(ii)(II). Matos moves the court to suppress all evidence obtained by the Government as the product of a warrantless arrest without probable cause, as well as other violations of the Fourth and Fifth Amendments to the U.S. Constitution. Further, Matos seeks discovery of the Government's intended Rule 404(b) evidence, Jencks Act material, and exculpatory evidence due under [Brady v. Maryland, 373 U.S. 83 \(1963\)](#).

This court held an evidentiary hearing on Defendant's motion on May 15, 2008 (the "Suppression Hearing"). At the Suppression Hearing, the Government's witnesses proffered a factual account of events diametrically opposed to that presented by Matos, testifying on his own behalf. It falls to this court to assess the credibility of the witnesses. See, e.g., [United States v. Yousef, 327 F.3d 56, 124 \(2d Cir. 2003\)](#) (on a suppression motion, "[c]redibility determinations are the province of the trial judges . . .") (internal citation omitted).

Because I find Defendant's account to be far more credible than that set forth by the Government, Defendant's motion to suppress is GRANTED in its entirety. The court declines to decide Defendant's requests for discovery at this time.

**I. Background**

On November 8, 2007, a team from the United States Marshal Service Fugitive Task Force (the "Fugitive Task Force Team") conducted surveillance of a residence located at 1557 81st Street, Brooklyn, New York in pursuit of Anthony Matos, a fugitive wanted on New York murder charges. (Transcript of the Suppression Hearing ("Tr.") at 7.) Instead of interdicting the target - Anthony Matos - they intercepted Defendant Edgar Matos, a cousin of the fugitive they sought to apprehend. Defendant was arrested and charged with drug offenses unrelated to his cousin's alleged crime.

#### A. The Police Officers' Testimony

Deputy U.S. Marshal Dennis Tait and N.Y.P.D. Detective Adam Heege, members of the Fugitive Task Force Team, testified on behalf of the [Government at the Suppression Hearing](#).<sup>1</sup> Together Heege and Tait presented the following version of events to the court:

At around 2:30 or 3:00 pm, the Fugitive Task Force Team began its surveillance of the residence at 1557 81st Street. ([Id. at 7](#), 39.) Six or seven officers were situated in four separate cars parked along the block. ([Id. at 7-8](#), 22, 38.) Hours into the stakeout, sometime between 5 and 6 pm, Heege and Tait observed a man emerge from the residence. ([Id. at 11](#), 20, 40.) He was talking on his cell phone and carrying a shopping bag. The officers, clad in plainclothes, exited their car "to attempt to interview him." ([Id. at 9-11](#), 40.)<sup>2</sup> The man then tucked his phone to his shoulder and reached down to either his pocket or waistband. ([Id. at 11](#), 40.) With this motion, the man dropped two Ziploc bags to the ground in plain view of the officers. ([Id. at 11](#), 28, 40.) In a matter of seconds, Tait detained the man while Heege retrieved the bags. ([Id. at 11](#), 29, 41.) The bags appeared to contain cocaine. ([Id. at 12](#).) As a result, the officers handcuffed him, took him into custody, and identified him as Defendant Edgar Matos. ([Id. at 11](#), 41, 60.)<sup>3</sup> No officer drew a weapon during this encounter. ([Id. at 10](#), 28, 42.)

As Tait handcuffed Matos, he noticed clothes in the shopping bag Matos had been carrying and asked whether the clothes belonged to him. Matos replied that they belonged to his cousin, Anthony. ([Id. at 12](#).) Tait then "stated something to the effect about Anthony," that Anthony was "what we're here for." ([Id. at 13](#).) In response to Tait's question or comment, Matos allegedly stated "get me off the street" and asked to be taken inside his apartment, because he did not want to talk to the officers outside. ([Id. at 61](#), 12.)

The full Fugitive Task Force Team joined them outside the apartment. (*Id.* at 13.) Tait testified that the officers used Matos' keys to enter the apartment, but he could not recall who took the keys from Matos. (*Id.* at 13, 29-30.) Similarly, Heege assumed that keys were obtained from Matos in order to enter, but he did not know how or by whom, though he had Matos handcuffed by his side at the time. (*Id.* at 42, 61.) Heege brought Matos inside after other members of the Fugitive Task Force Team conducted a protective sweep of the apartment. (*Id.* at 41, 13.)

Both officers testified that once inside the apartment, Matos spontaneously blurted out that he had "drugs in the cabinet," and indicated a cabinet above the refrigerator by "nodding his head." (*Id.* at 14.) He offered to the officers: "You could take those, and if I help you catch my cousin Anthony, can I walk away from this?" (*Id.*; see also *id.* at 43-44 (recounting the statement as "I'll give you Anthony and all the drugs in the cabinet, if you let me walk away from this.") Heege asked about the quantity of the drugs, to which Matos responded "a lot." (*Id.* at 43.) Seeing a padlock on the cabinet door, Tait asked Matos how to open it. (*Id.* at 14.) Matos responded that there was a key on top of the television. (*Id.* at 14, 43.) Tait testified that Heege then explained that Matos "couldn't walk away from it" and told him "You have to be arrested for the drugs that were in the house and that were recovered outside." (*Id.* at 15.) However, the officers next asked Matos "how he thought he could assist with Anthony." Matos stated in response that maybe he could make a cell phone call to Anthony. (*Id.*) The officers proceeded to question Matos further about Anthony and Matos' own drug deals, and they reviewed the address book and call log on his cell phone. (*Id.* at 15-16.)

Tait contacted his supervisor, who offered to reach out to the Drug Enforcement Agency ("DEA"). The officers waited in the apartment with Matos for "well over an hour," "maybe an hour and a half." (*Id.* at 17, 45.) During this protracted waiting time, no officer read Matos his Miranda rights, and no officer sought his express consent to search the apartment or the cabinet. The officers eventually learned that DEA would not be responding to the scene and determined that they would proceed with a search independently. Heege opened the locked kitchen cabinet. (*Id.* at 17-23.) The officers uncovered a large baking tray, a brick and a half of cocaine, ammunition, electronic scales, drug paraphernalia, an envelope filled with U.S. currency, and a black bag containing more little Ziploc bags of cocaine. (*Id.* at 17-18, 45-46.) Tait contacted his supervisor again, and this time DEA

agreed to respond. (*Id.* at 18-19.) DEA took somewhere between another 30 minutes to an hour and a half later to arrive. (*Id.* at 19, 64.) Agent Weil recalled that it was about 8:30 or 8:40 pm when DEA reached the residence. (*Id.* at 68.)

After the search of the cabinet, Heege finally read Matos his Miranda rights and provided Matos with an Advice of Rights card for his acknowledgement and signature. (*Id.* at 47-49.) Heege proceeded to ask Matos further questions about the drugs and Matos' involvement with his cousin Anthony. (*Id.* at 19.) Heege asked whether the drugs in the cabinet belonged to Anthony; Matos replied that no, the drugs were his own. (*Id.* at 49-50.) He also asked whether there was a gun in the house, to which Matos replied there was not, and Heege then asked for permission to search the bedroom for a gun anyway. (*Id.* at 50.) Matos refused the request to search.

Tait took Matos out to the police car to await the arrival of the DEA. *Id.* Both officers testified that Matos never requested an attorney. (*Id.* at 51.)

#### B. Defendant's Testimony

In sharp contrast, Matos testified that as he exited the apartment, the officers immediately sprung from their vehicles, weapons drawn, yelling "Don't fucking move! If you move I will blow your head off!" (*Id.* at 81-82; Affidavit of Edgar Matos, dated March 28, 2008, Docket #24, Ex. 7 ("Matos Aff.") at ¶3.) He denies dropping anything to the ground. (Tr. at 82.) Matos stood in shock, "scared to get shot." (*Id.* at 82, 84.) Quickly, several officers surrounded him, his keys were taken from his pocket, and then he was handcuffed. (Matos Aff. at ¶4; Tr. at 83-84.) He denies asking to be taken off the street and into the apartment, and denies consenting to any entry or any search of the apartment. (Matos Aff. at ¶6; Tr. at 85.) The team of police officers entered the apartment, guns still drawn. (Tr. at 85.) He claims that "once inside the apartment, the agents began searching," "looking around in the drawers, the cabinets, with a flashlight," and found a set of keys in a drawer near the stove that fit the kitchen cabinet. (Matos Aff. at ¶7; Tr. at 85-86.) The officers complained they "didn't find nothing." (Tr. at 86-87.)

Matos contends he never consented to a search of the cabinet. (*Id.* at 88.) He testified that he protested when the officers used the keys to open the cabinet, and recalled Officer Heege protesting as well, admonishing another

officer to "Put the lock back on. Let's do it the right way." (*Id.* at 88.) According to Matos, the officers "kept asking me about my cousin, where is my cousin." (*Id.* at 87.) Matos stated that the officers urged him to call Anthony to set him up for arrest, to "let him turn himself in and I will be okay." (*Id.* at 87.) He testified that this pressure continued as the officers discussed cutting a deal with him. (*Id.* at 89.) Further, an officer looked at his cellular phone and his call log, and had Matos listen to his voicemail in the presence of the officers. (Matos Aff. at ¶9; Tr. at 91.) Matos alleges that he invoked his right to counsel and requested an opportunity to call his attorney, Jay Schwitzman, after Mr. Schwitzman's business card was discovered during this search. (Matos Aff. at ¶8; Tr. at 88.)

### C. Undisputed Facts

It is undisputed that Matos received and signed an Advice of Rights card containing the Miranda warnings at 7:20 pm, after the officers had already searched the kitchen cabinet. (Suppression Hearing, Govt. Ex. 3500-AH-1; Docket #24, Ex. 5.) No officer informed Matos of his Miranda rights prior to the introduction of the card. The officers only sought Matos' explicit consent to search the apartment after the cabinet had already been opened and searched. (U.S. Marshals Service Report of Investigation, dated January 17, 2008, Docket #24, Ex. 4 ("Once the cabinet was opened . . . [h]e was asked whether he would consent to a search of the rest of the apartment, to which he stated that he would not consent."); DEA Report of Investigation, dated January 14, 2008, Docket #24, Ex. 6 at 177-178 (after the DEA arrived, "SA Weil attempted to gain written consent to search the apartment via DEA form 88"); Matos Aff. at ¶10; Tr. at 93-95.) Matos replied: "Do whatever you are going to do." (*Id.*) Matos never signed a written consent to search the apartment. (Matos Aff. at ¶10.)

### D. Evidence at Issue

The Government seeks to admit the following physical evidence at trial: two Ziploc plastic bags enclosing smaller Ziploc bags filled with cocaine, allegedly found on the ground outside the Defendant's residence, and the stash of drug and non-drug evidence found inside a kitchen cabinet above the refrigerator inside the Defendant's apartment. (Tr. at 3.) The Government also seeks to admit the following statements, made in the course of Matos' arrest prior to the issuance of any Miranda warnings:

- 1) Matos' purported request to "get me off the street" while talking to the officers;
- 2) Matos' purported statement that there were "a lot of drugs" in the apartment, indication of the kitchen cabinet above the refrigerator, and offer to provide access to the cabinet and his cousin Anthony in exchange for his own freedom;
- 3) Matos' purported statement that the key to the cabinet was on top of the television.

([Id. at 4.](#))

Lastly, the Government seeks the admission of several post-Miranda statements, namely Matos' purported statements that:

- 1) "The drugs are mine, not Anthony's."
- 2) "There's no gun in this residence";
- 3) "What's going to happen to me afterward?"

([Id. at 4-5.](#))

## **II. Discussion**

When the police "reasonably believe that 'an offense has been or is being committed,'" they have probable cause to make an arrest even in the absence of a warrant. See [United States v. Scopo, 19 F.3d 777, 781 \(2d Cir. 1994\)](#) (citing [United States v. Cruz, 834 F.2d 47, 50 \(2d Cir. 1987\)](#)). Probable cause "exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution in the belief that (1) an offense has been or is being committed (2) by the person to be arrested." [United States v. Fisher, 702 F.2d 372, 375 \(2d Cir. 1983\)](#). In the absence of probable cause, "the arrest is illegal and any obtained evidence is subject to the exclusionary rule." [United States v. Torres, No. 05-CR-838 \(NGG\), 2006 WL 1982750 at \\*2 \(E.D.N.Y. July 13, 2006\)](#). On a motion to suppress on the grounds of an illegal arrest without a warrant, the Government bears the burden to show that there was probable cause for the arrest. See [United](#)

[States v. Pena, 961 F.2d 333, 338-39 \(2d Cir. 1992\).](#)

The Government's argument that probable cause existed to arrest Matos hinges on a single disputed fact: the officers' allegation that, before Matos was detained, he threw the two Ziploc bags of cocaine to the ground in plain view of the officers outside his apartment. (Govt. Opp., Docket #28 at 9-11.) Matos contends that he never threw anything to the ground, but rather was surrounded by officers with guns blazing when he exited the apartment. (Tr. at 82-83.) The parties do not dispute that generally "[o]nce police officers observe a potentially incriminating item in plain view, they have probable cause to arrest a suspect." [United States v. Rodriguez, No. 07 Cr. 1150 \(VM\), \\_\\_\\_ F.Supp.2d \\_\\_\\_, 2008 WL 2923727 at \\*2 \(S.D.N.Y., Jul. 25, 2008\)](#), citing [Savino v. City of New York, 331 F.3d 63, 76 \(2d Cir. 2003\)](#). The only issue left for this court's resolution is whom to believe.

Upon my observation of the witnesses and review of the testimony at the Suppression Hearing, I find the officers' chronicle of events to be a complete fabrication. Each step of the officers' story defies credibility. These officers were ostensibly trained specialists in the location and apprehension of suspected criminals on the run from law enforcement. (Tr. at 7, 40; see Government's Post-Hearing Memorandum of Law in Opposition to the Defendant's Pretrial Motion ("Govt. Post-Hearing Opp."), Docket #35 at 4.) On the day in question, the team of six to nine officers was focused on one specific mission: the apprehension of an alleged murderer. (Tr. at 7; see [id.](#), at 22, 38, 83.) They believed their suspect to be hiding in the very same apartment from which they saw Matos emerge, and no doubt believed their suspect to be dangerous. (See [id.](#) at 22.) The sole task of these officers was to watch the vicinity of the entrance to the residence, to catch their fugitive in the act of arriving or departing.

It strains credibility to believe that these officers would see Matos leave that apartment and "calmly walk[] towards him" to "interview him." ([Id.](#) at 42, 9.)<sup>4</sup> They spent hours that day lying in wait outside the apartment, disguised in plainclothes and confined to their cars. ([Id.](#) at 23.) Secrecy was critical to their mission. (See [id.](#) at 57 (confirming that the officers did not want to reveal themselves "until needed" and characterizing the team's approach to be "[a]s secretive as we can be, yes".) The officers offered no rationale to explain why they would abandon their cover so casually, and so jeopardize their whole operation and their own safety when possibly approaching a dangerous felon on the street.

Furthermore, the officers testified that the crucial moment came when Matos reached to his pocket or waistband, allegedly to access the Ziploc bags he then threw to the ground. (Id. at 11, 28, 40.) Under these circumstances, the officers' mutual insistence that they witnessed this motion but neither drew a weapon or even screamed at him is too absurd to be credible. (Id. at 10, 28-29, 42, 51.) Police officers routinely profess that reaching into a waistband is a threatening move in circumstances where criminal activity is suspected, because "[w]eapons frequently are carried or hidden in the waistbands." See, e.g., [United States v. Holmes](#), 487 F. Supp. 2d 1206, 1215 (D. Kan. 2007). The court finds it incredible that experienced law enforcement officers would react so coolly to such a motion, especially if made by a suspected associate of an alleged murderer.

The officers' extraordinary delay in issuing the Miranda warnings to Matos not only raises an independent constitutional question, but also casts serious doubt upon the reliability of the officers' account. It is undisputed that the officers waited until 7:20 pm, over an hour - and possibly two hours - after Matos' arrest, to administer the Miranda warnings. (Docket #24, Ex. 5; see Tr. at 47-49.) Tait admitted he carried an Advice of Rights card with him, for the "purpose of effecting a proper legal arrest." (Tr. at 32.) Yet the officers read Matos his rights only after uncovering the drug evidence in the course of the cabinet search.<sup>5</sup> The officers provide no reason whatsoever for why they would wait to "read the Miranda warnings *hours later*," when they claim they had effectuated a legal arrest upon the initial encounter. (Id. at 62 (emphasis added).) The obvious inference is that for all those hours, the officers in fact had no drug evidence against Matos and no basis for his arrest. Only the discovery of the cocaine in the cabinet triggered a justifiable arrest.

Based upon the testimony and demeanor of the officers at the Suppression Hearing, the improbability of their story, and the unfathomable behavior with respect to the Miranda warnings presented by their own account, the court concludes that the account of the arrest offered by Officers Tait and Heege is not credible. The court also finds that on this threshold issue, Matos set forth a far more sincere and plausible account of these events. The zealous approach of the officers depicted by Matos may seem more dramatic, but it is also more consistent with the logical reaction of police officers anticipating a face-to-face encounter with a dangerous fugitive. Given that the object of the officers' mission was to apprehend another man who was a relative of the defendant, the implication of Matos' story is that either the officers mistook

him for his cousin, or they were intent on seizing him as a conduit to catch his cousin. They exploited the opportunity to hold him in custody and escalated their investigation. The officers' allegation that they were galvanized by seeing Matos with cocaine made for a convenient pretext, but it is a story unworthy of this court's credence. The Government has failed to carry its burden. In the absence of "reasonably trustworthy information of facts and circumstances" demonstrating probable cause, the court holds that Matos' arrest was unlawful. See [Fisher, 702 F.2d at 375](#).

The exclusionary rule requires the suppression of evidence stemming from a warrantless arrest devoid of probable cause, including evidence obtained as an indirect result of the arrest. See [Wong Sun v. United States, 371 U.S. 471, 484-85 \(1963\)](#). The exclusion applies to "tangible, physical material actually seized" as well as "items observed or words overheard" and "confessions or statements of the accused obtained during an illegal detention." [United States v. Crews, 445 U.S. 463, 470 \(1980\)](#); see also [United States v. Fisher, 702 F.2d 372, 379 \(2d Cir. 1983\)](#).

In this case, each statement and item offered by the Government was obtained as a result of Matos' illegal arrest. There can be no argument that the "taint" of the initial illegal arrest dissipated over the hours that the officers held Matos in custody in his home; if anything, the "lawless conduct of the police" only built momentum as they exploited the illegal detention. [United States v. Ceccolini, 435 U.S. 268, 273-74 \(1978\)](#) (setting forth attenuation analysis); see, e.g., [United States v. Webb, 480 F. Supp. 750, 756-57 \(E.D.N.Y. 1979\)](#) (finding that taint of unlawful arrest did not dissipate where defendant was continuously in custody and "the path between the illegal arrest and the subsequent seizure of its fruits is clear").

### **III. Conclusion**

Based upon the above findings of fact and conclusions of law, I conclude that the officers lacked probable cause to arrest Matos. Each of the above statements and items of physical evidence is a product of that unlawful arrest, inadmissible as "fruit of the poisonous tree." See [Wong Sun, 371 U.S. at 484-85, 488](#). Accordingly, the Defendant's motion to suppress the items of evidence sought to be introduced by the Government is granted.

SO ORDERED.

1. Special Agent Eric Weil of the Drug Enforcement Agency (DEA) also testified for the limited purpose of cataloging the items seized from Defendant.
2. Heege recalled identifying himself as a police officer at this time, and wearing a vest printed with the word "Police"; Tait identified himself as a police officer when he detained Matos. (Id. at 42, 11.)
3. The Government affirms that Matos was under arrest once handcuffed. (See Government's Memorandum of Law in Opposition to the Defendant's Pretrial Motion ("Govt. Opp."), Docket #28 at 2; see also Tr. at 60.)
4. No evidence was presented by the Government or by the Defendant to clarify whether or not cousins Anthony and Edgar Matos physically resembled one another.
5. The procedure for promptly informing persons in custody of their Miranda rights is hardly a secret. Even the most casual and unschooled observer of criminal procedure is fully aware of this obligation on the part of law enforcement. Popular television programs such as the long-running drama Law and Order provide the public on an almost daily basis with a recitation of the constitutional mantra.

NICHOLAS G. GARAUFGIS, United States District Judge.

The court directs that the parties appear for a status conference to take place on Thursday, October 2, 2008 at 12:00 noon to discuss future steps to be taken in light of the court's decision to grant Defendant's suppression motion.

The parties should be prepared to address the question of whether the court should make a referral to the United States Attorney for possible prosecution respecting the false testimony of Deputy U.S. Marshal Dennis Tait and N.Y.P.D. Detective Adam Heege at the suppression hearing of May 15, 2008.

SO ORDERED.

Dated: September 23, 2008