IN THE SUPERIOR COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, vs. GORDON B. SALAS Defendant.	CRIMINAL CASE NO. 0 1-0295C **ORDER DENYING MOTION TO SUPPRESS**

This matter came before the Court on December 4, 2001 at 9:00 a.m. in courtroom 223 A on Defendant GORDON B. SALAS's (hereinafter SALAS) Motion to Suppress. Assistant Attorney General Barry Hirshbein, Esq., appeared on behalf of the Government. Robert Torres, Esq., appeared on behalf of Defendant SALAS..

I. BACKGROUND

On April 23, 2001 Mr. Herman Ada telephoned the Department of Public Safety around 1l:OO a.m. to report a. possible criminal mischief incident at his residence in Koblerville. (Aff. Pro. C. at p. 1.) Mr. Ada informed the police that he heard loud noises the night before around 10:00 p.m. Mr. Ada believed that his sedan had over-heated again and had "begun to explode." (Aff. Pro. C. at p. 2.)

The officers dispatched to the residence conducted an investigation and observed what appeared to be a bullet hole in the radiator and another hole on the left front tire of Mr. Ada's sedan. (Aff. Pro. C. at p. 2.) Upon inspection of the residence, the officer observed shattered glass on the screen cover at the northern window and a "spider web" shape crack on the window louvers of the residence. (Aff. Pro. C. at p. 2.)

Further inspection revealed that two bullets had pierced through the plywood walls from the east. One bullet shattered the northern window. The other bullet was found lodged into the northern interior wall of the house. (Aff. Pro. C. at p. 2.) A search of the surrounding outside area of the residence led to the discovery of two spent .223 caliber cartridge casings. (Aff. Pro. C. at p. 3.)

Ms. Rose Ada, a family member present when the shots were fired, indicated that SALAS may be responsible for firing the shots. SALAS was engaged in an extra-marital affair with Ms. Ada. (Aff. Pro. C. at p. 3.) In response, Detectives Joseph Agulto, Bernard Santos and Diwain Stephen went to the SALAS residence on April 23, 2001. SALAS was home and the detectives informed him why they were there. (Comm. Ex. A) SALAS was asked if he owned a .223 caliber rifle. SALAS responded that he did and that it was and had always been in his possession. (Comm. Ex. A) Detective Santos then asked SALAS if he could Iook at the rifle and SALAS refused. (Comm. Ex. A) According to Detectives Agulto and Santos, SALAS stated that he would give his rifle to Lt. Manalili, his shift supervisor, the following morning. (Comm. Ex. A)

SALAS's version is that he told Detective Santo and Agulto that he would take his rifle down to the Department of Public Safety (hereinafter DPS) and that, "no one was to touch or take the gun without [his] permission." (SALAS Aff. p.2 at 9).

SALAS did take his rifle to DPS on April 24, 2001. SALAS met with Lt. Manalili and turned the rifle over to him. SALAS states that he specifically told Lt. Manalili that, "no one is to touch the gun because someone from the DEA task Force was going to come and take [him] to the range to shoot off some rounds." (SALAS Aff. p.2 at 13).

According to Lt. Manalili, SALAS approached him on April 24, 2001 and wanted to

discuss the shooting incident that happened two days earlier. (Def. Ex. C) SALAS explained to Lt. Manalili that, "he felt like he was being accused of the shooting because he had a .223 caliber rifle and the detectives wanted to confiscate his rifle." (Def. Ex. C) According to Lt. Manalili, SALAS went on to state that he told the detectives at his house that, "he wanted to talk to his supervisor first before allowing them to *test* the *rifle*." (Def. Ex. C) (Emphasis Added)

Lt. Manalili further states that SALAS asked him what he should do and Manalili replied, "he [SALAS] should allow them to test his rifle to clear his name." (Def. Ex. C) According to Manalili, SALAS then left the rifle with him. Lt. Manalili also states that SALAS, "'wanted to be present at the range when they tested his rifle." (Def. Ex. C)

SALAS's version of events picks up with his return to the DPS briefing room during the afternoon only to find his rifle gone. According to SALAS, he asked Lt. Manalili where his rifle went since he had explicitly stated that "no one was to take the gun." (SALAS Aff. p.2 at 16). SALAS states that Lt. Manalili claimed to have, "misunderstood" the instructions that SALAS had given him. (SALAS Aff. p.2 at 17) Lt. Manalili did admit during his testimony at the suppression hearing that he did have some type of misunderstanding with SALAS. The exact magnitude of the "misunderstanding" was never explored.

SALAS goes on to state that, "while I was in the briefing room, Lt. Manalili answered a call and spoke on the phone. He then said, "those guys are up there" and directed me to the DPS firing range in As Matuis. I then proceeded to the firing range on directions from Lt. Manalili. At all times I was still on duty went I went to the firing range." (SALAS Aff. p.2 at 20-22)

Lt. Manafili's version differs. According to Lt. Manalili, "Some time before noon Detective Santos contacted [him]. [Lt. Manalili]I explained to Santos that [he] would release the rifle to him for testing and told him that SALAS requested that he wanted to be present when they tested his rifle. Santos acknowledged and indicated that he would contact SALAS before they went out to the range to test the rifle." (Def. Ex. C)

Once at the firing range, SALAS states that he "demanded" his gun back from Range Master Ambrosio Ogumoro. SALAS goes on to state that Range Master Ogumoro then ordered him to, "load one live round into the chamber." SALAS states that he was "ordered" to load the

weapon and fire the rifle three times. (SALAS Aff. p.3 at 4-6) SALAS's version continues with him turning the rifle over to Range Master Ogumoro for "safe keeping" with the explicit instructions that no one was to take his rifle without his consent. (SALAS Aff. p.3 at 11-13)

According to SALAS, several weeks later he spoke with Range Master Ogumoro and asked to have his rifle returned. However, by the time SALAS asked for the return of his rifle, the rifle and the spent shell casings from the firing range were already in Guam for ballistic testing. (SALAS Aff. p.3 at 19-22)

Placing Defendant's motion in proper perspective, it rests upon the constitutional guarantees contained in the Fourth Amendment to the United States Constitution and in Article 1, section 3 of the Commonwealth Constitution guarantees which afford protection from unreasonable searches and seizures. According to SALAS, DPS violated the provisions of The 4th Amendment by seizing the bullet casing from the test firing and by taking his rifle from the armory and sending it Guam for ballistic testings. SALAS also states that his 5th Amendment right against self-incrimination was violated because his Miranda rights were not read to him prior to his firing the rifle. For reasons to be discussed below, this Court disagrees with both contentions.

II. ISSUES PRESENTED

SALAS's Motion to Suppress and the evidence presented at the oral argument present to the Court the following issues:

1. Whether DPS violated SALAS's constitutional guarantees contained in the Fourth Amendment to the United States Constitution and in Article 1, section 3 of the Commonwealth Constitution by seizing the spent .223 casings and by seizing SALAS's rifle from the DPS armory and sending it to Guam for ballistic testing.
2. Whether DPS violated SALAS's constitutional guarantees contained in the Fifth Amendment to the United States Constitution and in Article 1, section 4 of the Commonwealth Constitution by seizing the spent .223 casings from the firing range.

///

III. DISCUSSION

1. Standing

Fourth Amendment rights are personal rights that may not be vicariously asserted. Rakas v. Illinois, 439 U.S. 128, 133, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978), Commonwealth v. (D)tap, Crim. No. 98-0172 (N.M.I. Super. Ct. Dec. 28, 1998) ecision and Order on Defendant's Motion to Suppress at 5). Thus, to establish a Fourth Amendment violation, one must demonstrate a personal and legitimate expectation of privacy in the area searched or the property seized. Without such a showing, a criminal defendant cannot benefit from the exclusionary rule's protections because one cannot invoke the Fourth Amendment rights of others. United States v. Salvucci, 448 U.S. 83, 86-87, 100 S.Ct. 2547, 2550-2551, 65 L.Ed.2d 619 (1980).

It is un-controverted that the rifle seized and the shell casings belonged to Defendant SALAS. Accordingly, SALAS would have standing to challenge the seizure because he has a "personal and legitimate expectation of privacy" in both his rifle and in the shell casings that it produces upon firing.

2. State Action

Because DPS is the equivalent of a state or city police force, the individual members of the force are government actors, subject to the strictures of the Fourth Amendment. New Jersey v. T. L O., 469 U.S. 325, 335-337, 105 S.Ct. 733, 83 L. Ed. 2d 720.

3. Fourth Amendment / Article I section 3 Common wealth Constitution

The Fourth Amendment to the United States Constitution and Article 1, section 3 of the Commonwealth Constitution guarantee the "right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizure." U.S. CONST. amend IV; N.M.I. Const. art. I, § 3.

Searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few

specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). One such exception is that of consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973); Katz v. United States, 389 US, 358, 88 S.Ct. 507,515, 19 L.Ed.2d 576 (1967).

To be effective, consent to search must have been freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218,222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973); Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 36 L.Ed.2d 797 (1968); United States v. Rosi., 27 F. 3d. 409,411 (9th Cir. 1994) *citing* United States v. Castilla, 866 F. 2d. 1071 (9th Cir. 1988); United States v. Licata, 761 F. 2d. 537 (9th Cir. 1985). Justice Stewart articulated in Schneckloth v. Bustamonte the following rule:

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth, 412 U.S. at 248-249, 93 S.Ct. at 2059.

The government always bears the burden of proof to establish the existence of voluntary consent. U.S. v. Mendenhall, 446U.S. 554,557, 100 S.Ct. 1870, 1879, 64 L.Ed.2d 497 (1980); Schneckloth, 412 U.S. at 222, 93 S.Ct. at 2045; Bumper, 391 U.S. at 548, 88 S.Ct. at 1792; United States v. Rosi., 27 F.3d 409, 412 (9th Cir. 1994) citing United States v. Impink, 728 F.2d 1228, 1232 (9th Cir. 1984). The government must meet its burden by a preponderance of the evidence. U.S. v. Matlock, 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 996 n.14, 39 L.Ed. 2d 242 (1974).

Preponderance of the evidence is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a

whole shows that the fact sought to be proved is more probable than not, In re Barcinas, 4 N.M.I. 149 (1994).

Returning now to the factual specifics giving rise to the suppression motion it is important to note that the SALAS's account of the events was contradicted on material points by testimony during the suppression hearing and by the self-statements submitted by the investigating detectives. Regarding the contradictions, it should be noted that at a suppression hearing, the trial court is the exclusive trier of fact and judge of the credibility of the witnesses and the weight of their testimony. People v. Lopez, 205 Cal. App. 2d 807,817 (1962).

Reviewing the evidence and the factual specifics, as required by Schneckloth v. Bustamonte this Court finds that the Commonwealth has met its burden of demonstrating by a preponderance of the evidence that SALAS consented to the search and seizure of his rifle and of the spent shell casings and to the ballistic testing that was performed on each. The Court has come to this conclusion for a number of reasons.

It is undisputed that SALAS refused to turn over his rifle when Detective Santos asked 'him at the initial meeting at the SALAS residence. What is of more significance though is the undisputed testimony that SALAS would be bringing the rifle to Lt. Manalili the next morning. SALAS demonstrated by his refusal to turn over the rifle to Detective Santos that he was aware that he was under no obligation to do so. And, by taking his firearm to Lt. Manalili the next morning and actually leaving it with him, then returning later and personally firing the rifle, SALAS demonstrates to this Court that he voluntarily consented to the subsequent firing and testing of his rifle because a person who did not consent would not have taken such affirmative acts.

This conclusion is further supported by the conversation that SALAS had with Lt. Manalili when he brought the rifle in. SALAS was obviously concerned because he knew that he may be a suspect in the Ada shooting. This concern led him to Lt. Manalili. Lt. Manalili's statement that, "SALAS asked him what he should do and Manalili replied, "he [SALAS] should allow them to test his rifle to clear his name." accompanied by the fact that SALAS actually left the rifle with Lt. Manlili is most telling. This demonstrates to the Court strong indications that

SALAS had decided to cooperate with the investigation in an effort to remove himself from suspicion. The fact that SALAS actually left the rifle undermines his contention that he did not consent to the ballistic testing of the rifle,

Further, SALAS states in his own affidavit that he specifically told Lt. Manalili that, "'no one is to touch the gun *because someone from the DEA task Force was going to come and take [him] to the range* to *shoot off some rounds* (Emphasis Added)." (SALAS Aff. p.2 at 13). Be it the DEA or himself, this statement demonstrates that SALAS had made the decision to let someone test fire his rifle. If he hadn't, then he most likely would have refused to leave his rifle with Lt. Manalili, just as he did with Detective Santos.

SALAS argument that he was somehow coerced to fire his rifle because he was "ordered" to do so is without merit for a number of reasons. Although it is true that mere acquiescence to a claim of lawful authority or demand is not a valid consent, Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 36 L.Ed.2d 797 (1968), the facts do not support such a finding. The "orders" of Range Master Ogumoro were not "orders" in the way that SALAS attempts to present them.

Range Master Ogumoro testified at the suppression hearing that SALAS was following the range safety procedures by firing his rifle according to the Range Master's commands. These are the same commands that anyone firing a weapon in the same situation would be given. They were not unique to SALAS. SALAS argues that he was afraid that if he didn't follow both the "order" to travel to the firing range and the "order" by the Range Master on how to proceed once there, then he would be disciplined. This argument is undermined by SALAS's previous lack of concern for violating commands in refusing to turn over his rifle to Detective Santos, a senior officer, when requested at SALAS's residence. SALAS was no stranger to saying "no" in the face of authority.

SALAS also argues that he only turned his rifle over to the DPS armory for "safekeeping" (SALAS Aff. p.3 at 1 l-1 3) and not for further testing. It is true that when a person voluntarily consents to a search, the officer's authority to perform the search is not without limit. U.S. v. Jimeno, 500 U.S. 248,251, 111 S.Ct. 1801, 114 L. Ed. 2d 297,300 (1991). The extent of the

search *is* limited to the scope of the consent given, and by its expressed objective. Jimeno, 500 U.S. at 251, 11 1 S.Ct. at 1801, 114 L. Ed. 2d at 300.

The standard for measuring the scope of consent is that of objective reasonableness, i.e., what a reasonable person would have understood by the exchange between the officer and the individual. Jimeno, 500 U.S. at 25 I, 111 S.Ct. at 1801, 114 L. Ed. 2d at 300. It is undisputed the SALAS left his rifle with Lt. Manalili after speaking with him, apparently in response to Lt. Manalili's assertion that if he was not involved in the shooting then he should allow the rifle to be tested to "clear his name." (Comm. Ex. C) It is also undisputed that SALAS actually did fire three rounds off from his rifle for testing.

It seems reasonable to this Court that Lt. Manalili and the other Detectives involved would have taken the act of SALAS leaving his rifle with Lt. Manalili and of personally firing three rounds from the rifle as an assertion that he was cooperating and consenting to the firing of the weapon, the collection of the spent shell casings and the shipment of his rifle to Guam for testing. Consent to test firing the weapon naturally Ieads to the belief that consent is also present for the testing of the actual rifle that fired the shells. The two are part and parcel of the same process.

Taken as a whole, the actions of SALAS and the testimony of the investigating officers and of Range Master Ogumoro present evidence that demonstrates to this Court that SALAS did consent to the test firing of his rifle, the collection of the spent shells and the ballistic testing performed on both and that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Many times, actions speak louder than words,

4. Fifth Amendment /Miranda

The Fifth Amendment to the United States Constitution and Article 1, section 4 of the Commonwealth Constitution guarantee that no person shall be compelled in any criminal case, "to be a witness against himself." This is known as the privilege against self-incrimination. U.S. CONST. amend V; N.M.I. Const. art. I, § 4

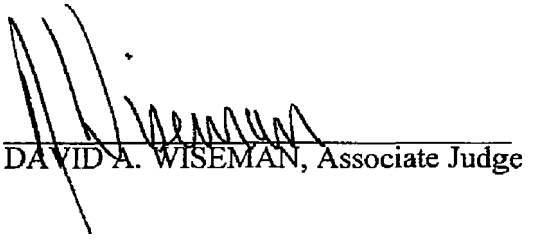
SALAS argues that his privilege against self-incrimination was violated because he was

not given his Miranda rights prior to the firing of the rifle. This argument is without merit because the Fifth Amendment right against self-incrimination applies only to testimonial statements. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed. **2d 908** (1966). The firing of a rifle is a non-testimonial event and not a statement. Accordingly, this Court holds that SALAS's privilege against self-incrimination under the U.S. Constitution and the Commonwealth Constitution was not violated.

Iv. CONCLUSION

For the foregoing reasons, Defendant GORDON B.SALAS's Motion to Suppress evidence is **DENIED.**

So ORDERED this 1 8th day of December, 2001,



DAVID A. WISEMAN, Associate Judge