IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO: CR 12 566158 A**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
RAFAEL LABOY	)	**JOURNAL ENTRY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Defendant Rafael Laboy stands accused in a four-count indictment of two charges of felonious assault, one count of discharge of a firearm on or near a prohibited premises, and one count of criminal damaging. The first three charges all include one- and three-year firearm specifications. The indictment was returned on August 31, 2012.

Laboy was arraigned on September 5, 2012 and entered a plea of not guilty to all four counts. On November 13, 2012 he filed a motion to suppress. The State filed a tardy brief in opposition on January 3, 2013 and a hearing on the motion was held January 4. This entry follows.

STATEMENT OF FACTS

Samuel Ortiz, a Cleveland police patrolman, and the defendant were the only two witnesses at the hearing. State's exhibits 1 through 5 – all various photographs of the interior and exterior of a house at 3292 West 54 Street, Cleveland – were admitted into evidence.

On August 19, 2012, Ortiz and his partner were on patrol in the area of West 65 Street and Storer Avenue when colleagues reported hearing shots fired in the area of West 65 and

Denison. As Ortiz was going to help on that incident, he received a radio broadcast from a dispatcher to investigate shots fired near West 54 and Koch Court. It was about 4:45 in the morning.

Ortiz's investigation began with an interview at the West 56 Street residence of Maria Salas, the person who reported the gunshots. Salas told him that just a few minutes earlier her car was shot at near West 54 and Koch by a "tall, heavy set" man with a silver gun. Salas reported that there was also a second man, shorter than the first, who also had a gun but did not shoot at her car. Ortiz observed the passenger side window of Salas's car and it was shattered. He also saw bullet holes in the door.

Ortiz and his partner drove Salas to the place the shots had been fired. She pointed out to them the house at 3292 West 54. She told the police that the two men had come from that house and were probably still there.

Salas was then brought back to her house and Ortiz and his partner returned to 3292 West 54. Because gunshots had been fired, the call to the police was considered urgent and several other officers were on the scene.

The assisting police officers surrounded the house with their guns drawn and Ortiz approached the front door, also with his gun drawn. Ortiz knocked on the door. Co-defendant Israel Marrero answered and was brought onto the porch, frisked for weapons and handcuffed.

Ortiz returned his attention to the inside of the house on the assumption that at least one other person was still there and possibly armed. However, Ortiz noticed a pit bull. He therefore called a fellow responding officer who was known to be "good with dogs." As that officer came towards the porch, Laboy emerged from a back room and told the police that he

would put the dog in another room. He did so and then he too was brought out on the porch, frisked and handcuffed.

Both defendants were then asked whether there were any guns in the house. They said no. Ortiz then asked whether the police could search inside the house. Both consented.

The subsequent search uncovered two handguns (a revolver and a semi-automatic) and some ammunition. Photographs were taken showing the location of the guns and the ammunitions and the items were seized as evidence.

The defendants were then arrested and charged.

LAW AND ANALYSIS

Laboy seeks to exclude from admission into evidence at trial the guns, the ammunition, all pictures of the guns and ammunition, and all testimony about the guns or ammunition. He argues that the exclusion is warranted because the evidence was seized in violation of his constitutional rights.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 14 of the Ohio Constitution has a similar provision, and its protections have been found to be coextensive with those of the Fourth Amendment. *State v. Robinette*, 80 Ohio St. 3d 234, 245 (1997).

Warrantless searches are presumptively unconstitutional, subject to a limited number of specific exceptions. *State v. San Pedro Garcia*, 8th Dist. No. 97912, 2012-Ohio-5066, ¶6. Evidence that is obtained in violation of these constitutional provisions will generally be prohibited from trial under the exclusionary rule. *State v. McKiry*, 8th Dist. No. 88446, 2007-

Ohio-2762, ¶11. A pre-trial motion to suppress is a proper means to bring the question of a search's constitutionality before the court. However, a defendant's capacity, or standing, to claim the protection of the Fourth Amendment depends upon whether the defendant has a legitimate expectation of privacy in the invaded place. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

A person who challenges a search bears the burden of proving the expectation in order to show that he has standing to challenge the legality of that search. *State v. Peterson*, 166 Ohio App.3d 112, 2006-Ohio-1857, ¶9 (2d Dist.). Laboy did not meet that burden in this case. Ortiz testified that, on arrest, Laboy gave his address as 3288 West 54, his mother's house next door. His driver's license also listed his mother's address. Furthermore, although Laboy claimed to be a tenant of 3292 West 54 under a written lease, he could not name his landlord – other than to offer the first name Carmen – and could not produce a copy of the lease or even demonstrate that he has a key. The evidence supports a conclusion that, at best, Laboy was an occasional squatter in a vacant house next to his own. Because he was a person on private property with no right to be there, any subjective expectation of privacy that Laboy had was not legitimate. Society cannot recognize as reasonable a trespasser's expectation of privacy. Because Laboy cannot demonstrate standing to assert a constitutional violation, the motion to suppress must be denied.

Assuming, however, that Laboy does have standing, a second, independent ground to deny the motion is his consent to the search. Ortiz testified that both Laboy and co-defendant Marrerro agreed that the police could search the house. A search that is undertaken following valid consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). While it is true that both defendants were under arrest when they gave consent, that

fact alone does not make their consent involuntary; custodial status is just one factor a court should take into account when deciding whether consent was voluntary. *State v. Clark*, 8th Dist. No. 96768, 2012-Ohio-2058, ¶20. The evidence showed that both defendants had already voluntarily come to the door and had already told the police that they did not have any guns in the house. Knowing they were already under arrest – and, because the guns were hidden under a drawer, having confidence that they would not be found – consenting to a search was the product of a reasonable calculation of the risks and benefits to the defendants and not a result of coercion. Because Laboy's consent to the search was voluntary the motion to suppress must be denied.

A third, independent ground to deny the motion is also present here. Laboy filed his motion to suppress 69 days after he was arraigned. Rule 12(D) of the Ohio Rules of Criminal Procedure provides that "all pretrial motions . . . shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier." Laboy's motion was made well after the deadline and therefore must be denied.

CONCLUSION

For all of the foregoing reasons, the defendant Rafael Laboy's motion to suppress, filed November 13, 2012, is denied.

IT IS SO ORDERED:

_____ Date: _____

Judge John P. O'Donnell

A copy of this journal entry was sent by email this 8th day of January, 2013, to the following:

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Judge John P. O'Donnell