

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ARCADIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal No. 05-0086-DC-01
)	
ISTVAN C. SZABO,)	
)	
Defendant.)	

MEMORANDUM OPINION AND SENTENCING ORDER

CARR, District Judge:

This case, in which Defendant Istvan C. Szabo (“Szabo”) was charged with illegal reentry into the United States in violation of 8 U.S.C.A. § 1326(a) (West 1999), presents an important issue: Does the protection of the Fourth Amendment extend to non-citizens who are illegally in the United States?

This issue is raised by Szabo’s motion to set aside the guilty verdict on the ground that the Government’s central evidence against him at trial was the product of an illegal search and seizure that violated his Fourth Amendment rights. Szabo initially objected to this evidence by filing a pretrial motion to suppress, which was denied; he later made a timely objection to the introduction of the evidence at trial, which was overruled. He now raises the issue again through his post-trial motion to set aside the verdict.

For the reasons stated below, the Court DENIES Szabo's motion to set aside the verdict because, as an illegal alien within U.S. territory, Szabo has no rights under the Fourth Amendment that might have been violated by the search.

A. Background

The parties have stipulated to the following essential facts, which were supported by evidence presented during trial and post-trial hearings. (In so stipulating, Szabo expressly reserved the right to deny the commission of any crime.)

Szabo was born in 1954 in the city of Szeged in the Republic of Hungary, known at that time of Communist rule as the "People's Republic of Hungary." In 1956, Szabo's family fled Hungary, along with an estimated 190,000 other refugees, in the wake of the Hungarian Revolution and subsequent invasion by Soviet troops.

After a series of short stays in various European countries, Szabo's family made its way (by means that are not entirely clear) to the United States in 1957 and settled in the city of Brownsville, Texas. There, Szabo's father reunited with distant cousins and pursued his trade as a locksmith. In 1958, Szabo's parents applied for and received lawful permanent residency status, an official designation now commonly associated with the "green card."

Szabo attended elementary and high school in Brownsville, and, so far as the record reveals, enjoyed a relatively uneventful childhood until a summer evening in 1969, when he was 15 years old. That evening Szabo became involved in an altercation in the parking lot behind his high school, where a dance was taking place. Earlier, Szabo and a group of friends – two male and two female – had gone out to hunt for squirrels. Later that evening, outside the dance, they were confronted by four slightly older boys who were driving around the school parking lot and

drinking. Like Szabo and his friends, the older boys had not attended the dance but were waiting outside the parking lot for the dance to end.

When the older boys' car came close to side-swiping him, Szabo loudly cursed them. Although Szabo apologized for his remark, the older boys, all well-known school athletes, chased him until they eventually cornered him near the intersection of two fences in the school yard. Szabo yelled to his friends to go get help as the older boys began throwing asphalt in his direction. While his friends ran toward the school gymnasium in search of a teacher, Szabo removed his gun from his waistband and fired a shot into the air. Apparently undeterred, the older boys advanced on him. As they reached him, one grabbed for his gun, and a struggle ensued. Shots rang out. Three of the older boys fell seriously wounded; one later died.

Szabo denied intentionally shooting anyone, and pleaded self-defense, but he was charged with murder under Texas Penal Code section 1256 and prosecuted as a delinquent in the Texas juvenile justice system. In November 1969 the Juvenile Court of Cameron County found Szabo guilty of murder without malice, and sentenced him to two and a half years in a juvenile facility. In order to avoid this incarceration, in March of 1970 Szabo agreed to be deported by the I.N.S. to Argentina, a country to which other members of Szabo's extended family had previously emigrated from Europe and that had agreed to receive Szabo in lieu of his repatriation to his still-oppressed homeland.

The record is somewhat sparse as to the details of Szabo's life and whereabouts over the next several decades. Apparently he completed his high school education while living with his aunt and uncle in Buenos Aires, and then attended college and graduate school at the University of Santiago in Chile. While it is clear that Szabo did not return to the United States during this period, he did correspond regularly with his father and mother back in Brownsville until their

deaths in 1978 and 1982, respectively. He also saw his parents on their biannual visits to Argentina. Moreover, Szabo remained close to his brother and sister in the United States, who had since moved to El Paso. The three communicated by mail and telephone, and vacationed together every few years in various cities outside the United States.

Szabo also remained close to one of his old high school teachers from Brownsville, Dolores Leal. He exchanged letters with her and, as his own interest in a teaching career developed, became “pen-pals” with some members of Ms. Leal’s ninth-grade classes between 1980 and 1986.

Szabo became a university professor in Argentina, married and divorced, and participated in a number of mostly left-wing political movements and organizations in South America in the 1980s and 1990s. Apart from the ties noted above, however, there is no record that Szabo had any further direct contact with the territorial United States until June 21, 2004.

On the evening of that day, officers of the El Paso Police Department arrested Szabo after bursting into a motel room that Szabo had rented for the night. Apparently, the police had followed Szabo since the previous day when, according to Border Patrol agents, he had entered the United States near El Paso bearing identification papers that later proved to be forged.

The Border Patrol agents later testified that while they had seen no obvious reason to detain or search Szabo at the border, one of them had a “bad feeling” about Szabo’s demeanor. Based on Szabo’s representation that he was “headed toward El Paso,” the Border Patrol agents advised the El Paso Police Department to watch for a blue Chevrolet Celebrity bearing the license tag noted when Szabo crossed the border.

Although the police officers who burst in on Szabo at the Grand View Motel (about 15 miles from the spot where he had crossed the border) were only supposed to be keeping him

under surveillance, they later testified that a miscommunication from their Department's Intelligence Division had led them to believe that they in fact had a warrant to enter Szabo's motel room and seize him as a suspect in unspecified crimes.

When confronted by the police, Szabo initially insisted that he was one "Jan Horvath," and that he was in the United States in order to visit his sister and brother in El Paso. Upon a search of his jacket pockets, however, the police found a Buenos Aires driver's license and other papers correctly identifying him as Istvan C. Szabo. Without directly admitting his true identity, Szabo stopped calling himself "Horvath," but continued to insist that he was merely in the area to visit his siblings and their children, his nieces and nephews.

By this time, the police had phoned in Szabo's name to their headquarters and discovered that he was on a list of aliens who were not permitted in the United States.¹ At that point, the officers conducted a search of Szabo's room, over his objections, which revealed more alarming materials: photographs and maps of various office buildings and public works in the El Paso area; architectural drawings of municipal and county office buildings; and what the officers (and the Government) described as "radical literature:" tracts, journals, books, and articles highly critical of U.S. society and foreign policy, including those calling for "ceaseless struggle against oppressive United States interests in the hemisphere," as well as what the police described as "tools of covert operations:" desert boots; binoculars; heavy-duty gloves; wire-cutters.

Szabo continued to assert (as he has, indeed, throughout these proceedings) that he was simply in the area for a long-overdue family visit; that the maps and photographs appealed to his interest in local architecture and history; that the books and pamphlets reflected his professional

¹ The record does not make clear whether Szabo was on this list simply as a previous Texas-convicted felon, or whether he had somehow in the intervening years already come to the attention of U.S. authorities as a possible security risk.

and intellectual study of political theory (the field in which he taught); and that the gloves and boots and other implements were the normal accoutrements of an outdoorsman planning some hiking in the desert.

Armed with the information from Szabo's identification documents, the Government determined that there was a valid deportation order against Szabo and that he had not requested permission from the U.S. Attorney General to apply for readmission to the country. The Government ultimately charged Szabo with two crimes: (a) illegal reentry under 8 U.S.C. § 1326(a), which makes it a crime for an alien who has been previously deported from the United States to reenter without the consent of the U.S. Attorney General; and (b) conspiracy to bomb places of public use or government facilities, in violation of 18 U.S.C.A. § 2332f (West Supp. 2005). Prior to trial, counsel for Szabo filed a motion to suppress seeking to exclude Szabo's identification documents and any information contained in those documents, as well as all the other items contained in Szabo's room, on the grounds that they were obtained as a result of an illegal search and seizure in violation of the Fourth Amendment.²

The Government did not dispute that the search would indeed have been unconstitutional if the Fourth Amendment extended rights to Szabo. However, the Government argued that Szabo, as an illegal alien lacking significant connection to the United States, was not entitled to protection under the Fourth Amendment, even though the search was committed within the territorial United States.

² After the Court denied Szabo's pretrial suppression motion, but before trial, the Government dropped the conspiracy charge under Section 2332f without explanation and proceeded to trial on the illegal reentry count only.

The Court conducted an evidentiary hearing on February 19, 2005, and ultimately denied Szabo's motion to suppress.³ Szabo's counsel repeated his Fourth Amendment objection when the evidence was offered at trial, and the Court again overruled that objection. Szabo now moves to set aside the verdict on the same grounds.

B. Discussion

It is well settled that non-U.S. citizens within the territorial United States—and even, in some cases, illegal aliens—are not stripped of all entitlement to constitutional protection simply by virtue of their non-citizen status. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (holding the Equal Protection Clause applicable to illegal aliens); *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976) (Fifth and Fourteenth Amendments); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The question that has never been squarely adjudicated, however, and which we must now consider, is whether an illegal alien is entitled to the protection of the Fourth Amendment when the government conducts a search or seizure within the United States' borders.

The Fourth Amendment to the United States Constitution enjoins unreasonable searches and seizures. *See Whren v. United States*, 517 U.S. 806 (1996). The text of the Amendment 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.

³ At argument, the United States again conceded that, if the full protections of the Fourth Amendment apply to illegal aliens, the search of Szabo would be unconstitutional owing to the police officers' lack of individualized suspicion with respect to Szabo. This concession, while refreshing, is irrelevant given the Court's conclusion that the Fourth Amendment does not apply to Szabo.

U.S. Const. amend. IV (emphasis added). The Supreme Court has characterized the protections afforded by the Fourth Amendment as representing “‘the very essence of constitutional liberty’ the guaranty of which ‘is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen. . . .’” *Ker v. California*, 374 U.S. 23, 33 (1963) (quoting in part *Gouled v. United States*, 255 U.S. 298, 304 (1921)).

The exclusionary rule prevents the government from introducing evidence obtained in violation of the Fourth Amendment. It deters violations of the Fourth Amendment by “removing [the government’s] incentive to disregard it.” *See Stone v. Powell*, 428 U.S. 465, 492 (1976). Whether the benefits of this exclusionary rule, and the Fourth Amendment in general, accrue to illegal aliens is unclear. The Supreme Court has not expressly extended the protections of the Fourth Amendment to illegal aliens. In *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court held that illegal aliens had no right to the protections of the exclusionary rule in civil deportation hearings. In reaching this conclusion, the Court merely assumed, without deciding, that the Fourth Amendment protects illegal aliens in a criminal context from illegal searches and seizures. *Id.* at 1050.

Six years later, however, the Supreme Court cast doubt on the vitality of its assumption in *Lopez-Mendoza* that the Fourth Amendment universally applies to aliens. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court held that the Fourth Amendment does not apply to extraterritorial searches of the residences of alien defendants. *See id.* at 274-75. In an opinion authored by Chief Justice Rehnquist, the Supreme Court decided that the Fourth Amendment does not apply to extraterritorial searches and seizures by United States law enforcement officials of property owned by nonresident aliens. The Chief Justice’s opinion can be read so as to limit the meaning of the word “people” under the Fourth Amendment such that

the word “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265.⁴

At least one district court has adopted *Verdugo-Urquidez*'s “sufficient connection” test for purposes of examining the Fourth Amendment rights of an illegal alien within this country. *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1260 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004); *see also United States v. Ullah*, No. 04-CR-30A(F), 2005 WL 629487, at *29 (W.D.N.Y. March 17, 2005). Other courts have expressed more skepticism; *see, e.g., Martinez-Aguero v. Gonzalez*, No. EP-03-CA-411(KC), 2005 WL 388589, at *4 (W.D. Tex. Feb. 2, 2005).

Even if *Verdugo-Urquidez* lacks precedential value, however, this Court independently concludes that the Fourth Amendment, in its reference to “the people,” extends only to persons having a “sufficient connection” with the United States.⁵

Moreover, recent history, and the changes in our legal and political culture since “9/11” reinforce the reasons that the reach of the Fourth Amendment should be limited to those truly

⁴ The controlling effect on our case of Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* – and its “‘sufficient-connection’ test” – is not entirely clear. First, that earlier decision did not squarely address the rights of illegal aliens within the United States. Rather, it concerned the search of alien's property by United States agents at the alien's home in Mexico. Second, the Chief Justice's opinion – while styled as “The Opinion of the Court” – was arguably merely a plurality rather than a majority opinion, as one of the five justices who comprised the majority, Justice Kennedy, authored a concurring opinion. In his concurrence Justice Kennedy, while maintaining that he did “not . . . depart in fundamental respects from the opinion of the Court, which I join,” *id.* at 275, stated that he “[could] not place any weight on the reference to ‘the people’ in the Fourth Amendment as a source of restricting its protections.” *Id.* at 276.

⁵ Besides the Fourth Amendment, several other portions of the Constitution refer to “the people,” such as the Preamble, the First and Second Amendments; and the Ninth and Tenth Amendments. *See Akhil Reed Amar, The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 Utah L. Rev. 889, 892-93.

enjoying an ongoing connection to the United States. The terrorist attacks of September 11, 2001, have drastically changed the way in which the United States must approach interactions between law enforcement officers and foreign entrants to our country. It is well documented that failed immigration controls were an underlying cause of the tragedy. *See, e.g., The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* at 383-84, 390. Now, more than ever, it is essential for U.S. border security to know who is coming into our country. This Court will not undercut the effectiveness of our post-9/11 national security policy by allowing illegal aliens with an obscure connection to the American political community to side-step justice. To apply the exclusionary rule to an unreasonable search of a suspected terrorist would be to handcuff our own troops in the War on Terror. Once put on notice of a potential threat, law enforcement officers must be undeterred and unhampered in their investigation; once captured, aliens must be held accountable for illicit activity

Applying the “sufficient-connection test” to the facts, this Court holds that Szabo’s sporadic contact with the United States – consisting of a childhood, followed by a juvenile felony conviction and an absence of more than thirty years, alleviated only by communications to a few family members residing within the country – hardly constitutes a substantial connection.

Therefore, the Court finds that Szabo had no Fourth Amendment interests that might have been violated by the Government’s introduction of evidence against him at trial, even though that evidence was seized as result of a search without a warrant or good cause. Thus his motion to set aside the verdict on this ground is denied.

Carr, District Judge