DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE: WALLET (D-114)

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside auditoriums 8 and 9 of the Century 16 Theatres in Aurora, Colorado, during the early morning hours of July 20, 2012. In Motion D-114, he moves to suppress evidence found by law enforcement in his wallet. The People oppose the motion. The Court held an evidentiary hearing on the motion on October 15, 2013. Officer Justin Grizzle, Officer Jason Sweeney, Officer Jason Oviatt, Officer Aaron Blue, Sergeant Stephen Redfearn, Sergeant Matthew Fyles, and Detective Thomas Welton testified. For the reasons articulated in this Order, the Court concludes that the warrantless searches of the defendant's wallet fell within the search incident to

a lawful arrest exception to the warrant requirement. Accordingly, Motion D-114 fails.

CREDIBILITY DETERMINATIONS

The Court observed each witness' manner, demeanor, and body language while on the stand, and considered each witness' means of knowledge, strength of memory, and opportunity for observation. With respect to each witness, the Court assessed the reasonableness or unreasonableness of the testimony, the consistency or lack of consistency of the testimony, and whether the testimony was contradicted or supported by other evidence. The Court examined whether the witnesses had a motive to lie, as well as whether bias, prejudice, or interest in the case affected their testimony. Finally, the Court took into account all other facts and circumstances shown by the evidence which affected the credibility of any of the witnesses.

The Court finds the witnesses credible. Although the witnesses' recollection of events differed in some respects, the Court nevertheless concludes that their testimony is generally reliable.[1] Based on its credibility determinations, the Court makes factual findings. The Court's findings of fact resolve any conflicts in the testimony provided.

[1] In Order D-125, the Court finds Officer Grizzle's recollection of his interaction with the defendant insufficiently reliable. That part of Officer Grizzle's testimony is not relevant to this Order. The Court finds the rest of Officer Grizzle's testimony reliable.

FINDINGS OF FACT

Shortly after midnight on July 20, 2012, multiple officers from the Aurora Police Department received "a call for service" requesting them to respond to the Century 16 Theatres at 14300 East Alameda, in Aurora, Colorado. Dispatch informed officers that shots had been fired and that one person was down. An update indicated that there was an "active shooter" and that there were "multiple people down." At some point, officers were advised that the shooting was in auditorium 9.

Upon arrival, officers observed "mass chaos." One officer likened the scene to "a war zone," describing it as "absolutely chaotic." There was "blood all over the place," including on the sidewalk immediately outside the theater. There were injured parties covered in blood who were running out of the theater and screaming. Some of them had large wounds and appeared to be victims of a shooting. Individuals who appeared to have been shot were yelling, "help me, help me." Pointing toward auditorium 9, one girl told an officer: "It's back in there. It's coming from back in there."

Officer Sweeney parked on the southeast corner of the theater complex. As he made his way to the northeast end of the complex, he met Officer Oviatt. The two officers then proceeded south along the east side of the theater in an attempt to gain entry into the theater. At some point, they received information from one of

the officers on the front side of the theater that there was gas inside the theater. As Officer Blue walked in front of auditorium 9, he "could smell what smelled like tear gas."

Officers Sweeney and Oviatt observed someone they believed was a fellow officer standing beside a small, white car parked on the back side of the theater, near the rear emergency exit to auditorium 9. The individual was wearing a Kevlar helmet and a gas mask, and was dressed in black. As Officers Sweeney and Oviatt approached, this individual turned and looked at Officer Sweeney. Officer Sweeney noticed that the gas mask the individual was wearing was not consistent with department-issued gas masks. Additionally, both officers observed that, unlike all of the officers at the theater—who were active, moving around, and "trying to find a way into the building or trying to deal with people who had been injured"—this individual was "just standing there," taking off his gloves. Since the officers believed that gas had been deployed inside the theater and this individual who was wearing a gas mask did not appear to be an officer, Officers Oviatt and Sweeney concluded, almost simultaneously, that he was a suspect.

Officers Sweeney and Oviatt placed the individual under arrest and handcuffed him. The individual was later identified as James Eagan Holmes, the defendant in this case. The defendant does not dispute that this was a lawful arrest.

As Officers Sweeney and Oviatt placed the defendant in handcuffs, Officers Blue and Grizzle arrived and provided assistance. For officer safety reasons, Officers Sweeney and Oviatt pulled the defendant from the side of the vehicle to an area in front of a nearby dumpster. Officer Sweeney asked the defendant "if there was anybody else with him." The defendant responded, "no, it's just me." Officers then conducted what Officer Sweeney characterized as "basically a pat-down" search of the defendant. They recovered "a couple of pocket knives and a magazine for a handgun." Officers also retrieved a brown wallet from the defendant's pocket. Pursuant to Officer Sweeney's request, a marked police car responded to the location. Officers Oviatt and Blue then placed the defendant in the back seat of the patrol car.

Because Officer Blue wanted to learn the defendant's identity, he opened the wallet recovered during the pat-down search and took out a driver's license.[2] The photograph on the license matched the defendant's physical appearance. Officer Blue could not remember whether he put the license back in the wallet. However, he recalled placing both items on top of the patrol car's computer.[3]

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[2] The Court is aware that Officer Oviatt testified that Officer Blue gave him the wallet, and that he opened it, pulled out the driver's license, and later gave the wallet to Sergeant Fyles.

[3] Officer Oviatt also remembered having possession of the wallet at some point and placing it on top of the computer in the patrol car.

While the defendant was in the back seat of the patrol car, Officer Blue asked him if he had any weapons on him, and the defendant replied that he had four guns. The defendant volunteered that "he didn't have any bombs [at the theater], but [that] he had improvised explosive devices at his house" that would not "go off unless [police officers] set them off." Officer Blue inquired whether the address on the defendant's driver's license was correct. The defendant answered, "yes." Officer Blue then asked the defendant whether anybody else was with him. The defendant stated, "no."

Approximately a minute after placing the defendant in the patrol car, Officer Blue became concerned that the defendant "still had something on him" because there were multiple gunshot victims, officers had not yet located any guns, and the defendant was "fidgeting around," possibly trying to "get to something." Accordingly, less than five minutes later, the defendant was removed from the patrol car by Officers Oviatt and Blue so that they could conduct a more thorough search of his person. During this search, they took off the "full body armor" ballistic gear the defendant was wearing.[4] The defendant was then placed back in the patrol car.

Thereafter, Sergeant Redfearn took possession of the wallet. He looked through it and found the defendant's driver's license, a University of Colorado

[4] An officer noted at the hearing that the defendant was wearing what "a SWAT officer might wear." A SWAT officer is a Special Weapons and Tactics officer.

("C.U.") student ID card, and some credit cards. Sergeant Redfearn ran the address on the license through a computer database. He discovered that there had been a loud music complaint at the defendant's apartment within the hour, which made him suspicious. When asked to elaborate, he explained that something about that complaint being made shortly before the shooting "didn't seem right."

Sergeant Redfearn gave the wallet and its contents to Sergeant Fyles near the command post that had been set up outside the theater.[5] Sergeant Fyles did not search the wallet. Instead, he immediately handed it to Detective Welton, who had arrived on scene at around 1:45 in the morning, less than two hours after the shooting. By that time, the defendant had already been transported to the police station and the scene had been secured. Detective Welton estimated that Sergeant Fyles handed him the wallet sometime between 1:45 and 3:00 in the morning. He informed Sergeant Fyles that he would transport the wallet to the police station and place it into evidence.

Before placing the wallet into evidence, Detective Welton looked through it. He found a C.U. ID card, some credit cards, a health card, and U.S. currency. Detective Welton subsequently transported the wallet to the police station, copied its contents, and booked it into evidence.

[5] Sergeant Redfearn's memory was not clear as to how he obtained possession of the wallet. He believed that an officer handed it to him, and that, after looking at the driver's license, he placed the wallet on top of the computer in the patrol car. Sergeant Redfearn stated that he retrieved the wallet from that location "once the dust had settled and the suspect was gone," at which point he handed it to Sergeant Fyles.

ANALYSIS

"The United States Constitution protects individuals from unreasonable searches." *People v. Marshall*, 289 P.3d 27, 29 (Colo. 2012) (citing U.S. Const. amend. IV). Searches conducted without a warrant "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)) (other citations omitted). "A search incident to a lawful arrest is one of the specifically established exceptions to the warrant requirement." *Id.* (citation omitted). Under this exception, an officer may search a lawfully arrested individual's person, as well as the area within his immediate control. *Id.* A warrantless search of a person who is lawfully arrested and the seizure of his wallet are "reasonable and not [in] violation of the fourth amendment." *People v. Jones*, 767 P.2d 236, 237 (Colo. 1989) (citations omitted).

There is no dispute that the defendant's arrest was lawful. His wallet was recovered from his pocket during the pat-down search of his person. Immediately after retrieving the wallet, officers searched it. Because the retrieval of the wallet and the searches that followed by Officer Blue, Sergeant Redfearn, and possibly Officer Oviatt were incident to a lawful arrest, no warrant was required to avoid running afoul of the Fourth Amendment. *See id.*

The defendant argues that the last search of the wallet, which was conducted by Detective Welton around the command post after the defendant was transported to the police station and the crime scene was secure, was illegal. According to the defendant, that search required a warrant because by the time it was performed there were no longer exigencies present. A similar argument was rejected by the Colorado Supreme Court in *People v. Boff*, 766 P.2d 646 (Colo. 1988). There, the defendant was wearing his backpack when he was stopped by police. *Id.* at 647. At the time of his arrest, the backpack was on the ground, next to him and his motorcycle. *Id.* Officers waited to search the backpack until they had transported the backpack and the defendant to the county sheriff's office. *Id.* The defendant was subsequently charged with cultivation of marijuana based in part on the contents of the backpack. *Id.* at 647-48. The trial court granted the defendant's motion to suppress, reasoning that the search was not incident to arrest because at the time of the search the backpack was out of the defendant's control and, therefore, there were no exigent circumstances to justify the search. *Id.* at 648.

Relying on *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), the Court reversed the trial court's suppression order. The Court observed that "[t]he validity of the search of the backpack turn[ed] not on the presence or absence of the exigencies of police protection and evidence preservation, but on the fact that a person, under full custodial arrest based on

probable cause, loses his expectation of privacy as to those items on his person at the time of his arrest." *Boff*, 766 P.2d at 651-52 (citations omitted). The Court explained that "[a] search at the police station of a suspect, his clothes, and personal property immediately associated with his person, is justified to the same extent that such a search could have been made at the time and place of arrest." *Id.* at 651 (citations omitted).

Last year, in *Marshall*, the Colorado Supreme Court reiterated that "[a] search incident to a lawful arrest is one of the specifically established exceptions to the warrant requirement." 289 P.3d at 29 (citation omitted). Therefore, an officer is entitled to "search a lawfully arrested individual's person and the area within the arrestee's immediate control." *Id.* (citation omitted). That Marshall was already secure when officers searched the backpack located at his feet at the time of his arrest had "no bearing on the analysis." *Id.* at 31. As the Court explained, "Marshall forfeited his expectation of privacy in the backpack when he was arrested, pursuant to *Boff*." *Id.* The Court concluded that, since the officer's search of Marshall's backpack occurred incident to Marshall's lawful arrest, the trial court erred in granting the motion to suppress the contents of the backpack. *Id.*

As was the case in *Boff* and *Marshall*, here, the defendant's arrest was lawful. Thus, the search of the wallet by Detective Welton falls within the search

incident to a lawful arrest exception to the warrant requirement. The fact that the defendant had already been transported to the police station and that the crime scene had been secure when this search occurred has no bearing on the Court's analysis. This is so because the search incident to a lawful arrest exception to the warrant requirement is not premised on the presence of exigencies. *See Boff*, 766 P.2d at 651-52. Regardless of whether exigencies remained at the time of the search, the defendant had previously forfeited his expectation of privacy in the wallet.

At the hearing, the defendant maintained that Detective Welton's search was unlawful because it was neither conducted at the scene before the defendant was transported to the police station nor at the police station after the defendant was transferred there. The defendant cited no authority for this proposition, and the Court is aware of none. The defendant's forfeiture of his expectation of privacy in the wallet occurred following his lawful arrest. Therefore, the fact that the defendant was already at the police station when the wallet was searched by Detective Welton at the scene of the crime is inconsequential. Once the defendant's expectation of privacy in his wallet ceased to exist, law enforcement could have searched it anywhere, without regard to the defendant's physical proximity. *See generally Marshall*, 289 P.3d at 29 (disagreeing with the trial court's conclusion that the search of the defendant's backpack in the parking lot of

his residence was illegal because he may have been in the police car at the time of the search).

Finally, the defendant's reliance on *Gant*, *see* Reply at p. 1, is misplaced. *Gant* "overturned the 'widely understood' interpretation of *New York v. Belton*, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), that a vehicle search conducted incident to the arrest of a recent occupant is a valid exception to the warrant requirement," notwithstanding the fact that there is no possibility the individual arrested can gain access to the vehicle at the time of the search. *Marshall*, 289 P.3d at 30 (citations omitted). Departing from the "brightline rule" established in *Belton*, the Court in *Gant* held that an officer "may search a vehicle incident to an occupant's arrest only where 'the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.'" *Id.* (quoting *Gant*, 556 U.S. at 351, 129 S.Ct. 1710).

Contrary to the defendant's contention, *Gant* is inapposite, as "there is a factual distinction between searches of cars and persons." *Id.* (explaining that "[t]he *Gant* Court's recitation of the general proposition that a search is illegal where there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, must be understood in the context of that case—namely, an arrestee's ability to reach into the passenger compartment of his

vehicle") (internal quotation marks and citations, including an internal citation, omitted). The search of an individual "necessarily involves greater officer safety concerns" than does the search of a vehicle because, "unlike items in the compartment of a vehicle, the arrested individual might still be able to access those items on his person even after arrest." *Id.* Furthermore, since "the items remain in close proximity to an arrested individual, he might still be able to access that evidence." *Id.*

Thus, in Colorado, the decision in *Boff* continues to control searches of an individual's person incident to a lawful arrest. *Id.* at 30-31. Under *Boff*, the searches of the defendant's wallet were valid under the Colorado Supreme Court's Fourth Amendment jurisprudence. Therefore, the defendant's motion fails.

CONCLUSION

For all the foregoing reasons, the Court concludes that the warrantless searches of the defendant's wallet fell within the search incident to a lawful arrest exception to the warrant requirement. Because the defendant's Fourth Amendment rights were not violated, Motion D-114 is denied.

Dated this 25th day of October of 2013.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, a true and correct copy of the **Order regarding defendant's motion to suppress evidence: wallet (D-114)** was served upon the following parties of record:

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