NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 KA 1367

STATE OF LOUISIANA

VERSUS

ELIJAH HAWTHORNE

Judgment rendered December 23, 2009.

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Appealed from the
21st Judicial District Court
in and for the Parish of Tangipahoa, Louisiana
Trial Court No. 601117
Honorable W. Ray Chutz, Judge

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BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

PETTIGREW, J.

The defendant, Elijah Hawthorne, was charged by indictment with the first degree murder of Samuel Galaforo, Sr.[1], who, at the time of his death, was eighty-five years old. See La. R.S. 14:30. After the trial court denied the defendant's motion to suppress evidence obtained in a search of his residence and incriminating statements made to a fellow inmate, the defendant entered a **Crosby** plea of guilty, reserving his right to appeal the court's ruling on the motion to suppress. See **State v. Crosby**, 338 So.2d 584 (La. 1976). In return, the State waived its right to seek the death penalty. The trial court sentenced the defendant to life imprisonment at hard labor, without the benefit of parole, in accordance with the plea agreement. The defendant appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

While investigating Galaforo's murder, the Tangipahoa Parish Sheriff's Office determined the defendant to be a likely suspect. While in his kitchen, Galaforo had been stabbed approximately eight times, at least three of which penetrated his heart. When interviewed regarding his relationship with Galaforo and his whereabouts at the time of the murder, the defendant explained that he had been at Galaforo's house the day before his death. The record does not detail the reasons given for the visit.

During his interview with the defendant, Detective Gary Baham suggested to the defendant that he submit to a psychological-stress evaluator, a form of lie detection, and he initially agreed. However, he later stated that he did not want to submit to the lie-detection test before discussing it with his wife. When she, in front of officers, suggested he should take the test, the defendant changed his mind and stated he would not do so. The defendant was returned to his home, and the officers continued to investigate, ultimately identifying the defendant as their "prime" suspect.

During this investigation, the defendant was on bond for an unauthorized use of a movable arrest. Detective Stuart Murphy spoke with the surety on the defendant's bond,

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[1] We note that the victim is referred to as both "Galaforo" and "Galafora" throughout the record.

Mike Launey, and Detective Murphy explained that the defendant was a suspect in a first degree murder investigation. As a result, Launey determined that the risk of covering the defendant's bond was too high to continue acting as his surety. Fearing that the defendant's status as a murder suspect would cause him to flee, Launey notified Detective Murphy that he no longer wished to cover the defendant's bond. In response, the defendant was taken into custody.[2] Launey did fill out a "Bondsman Off Bond Form," indicating he would no longer act as the defendant's surety, although it may have been as much as a couple of hours after officers took the defendant to jail. After he was returned to jail, the defendant's bond remained at $500.00, which was the original amount set for the misdemeanor unauthorized use of a moveable arrest.

Detective Baham asked the defendant's wife, Rosa Lee Hawthorne, for consent to search the house. She agreed and signed a form indicating her voluntary consent. During the search, the officers found shoestrings, soaking in bleach, and tennis shoes without strings in them. They seized the defendant's bicycle and found what appeared to be blood on the handlebar. They also found drug paraphernalia and evidence that the defendant had stolen a television. The defendant was placed under arrest for possession of drug paraphernalia and felony theft as a result of the search. Items that the officers suspected were relevant to the murder investigation were collected to be sent for scientific analysis.

While in jail after his arrest for possession of drug paraphernalia and felony theft, the defendant shared a cell with Marvin Patrick and made incriminating statements to him.[3] Although Patrick had cooperated with law enforcement in the past, he was not intentionally placed in a cell with the defendant. The information gathered from Patrick led to the defendant's arrest for Galaforo's murder. After the trial court denied his motion

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[2] Detective Baham wrongly testified that the defendant's bond had been "revoked." On the contrary, the bond was still valid but the surety was no longer willing to satisfy the bond on the defendant's behalf.

[3] The record does not reveal exactly what the defendant told Patrick. However, during the preliminary examination hearing, Detective Baham testified that the defendant told Patrick that Galaforo had been stabbed six or eight times, numbers that were consistent with the wounds and that had not been revealed to the public, and also that he placed his shoestrings in bleach to dissolve the blood on them. When asked whether the defendant "admitted to the murder of Samuel Galafora, Sr." to anyone, Detective Baham testified that he did so admit to Patrick.

to suppress the evidence seized at his house and the statements made to Patrick, the defendant pled guilty to Galaforo's murder in return for the State waiving the death penalty.

DETENTION OF DEFENDANT UPON SURRENDER BY SURETY

In his first assignment of error, the defendant alleges that the police unlawfully remanded him into custody after "having his bond revoked without the necessary court intervention." However, the defendant's bond was not revoked. Rather, the surety "surrendered" the defendant, as he was no longer willing to satisfy the bond on the defendant's behalf. Louisiana Code of Criminal Procedure article 345(A) provides the proper procedures for the surrender of the defendant:

> *A surety may surrender the defendant* or the defendant may surrender himself, in open court or *to the officer charged with his detention, at any time* prior to forfeiture or within the time allowed by law for setting aside a judgment of forfeiture of the bail bond. For the purpose of surrendering the defendant, the surety may arrest him. Upon surrender of the defendant, the officer shall detain the defendant in his custody as upon the original commitment and shall acknowledge the surrender by a certificate signed by him and delivered to the surety. Thereafter, the surety shall be fully and finally discharged and relieved of any and all obligation under the bond. [Emphasis added.]

By the unambiguous language of Article 345, a surety may surrender the defendant *at any time* and, upon surrender, the officer *shall* detain the defendant in his custody. Thus, an officer charged with the detention of a defendant has no discretion to refuse to accept a surety's lawful surrender of that defendant. **State v. Kerrison**, 97-1759 (La. 10/17/97), 701 So.2d 1347, 1348.

The surety in this case initially notified the Tangipahoa Parish Sheriff's Office of his surrender of the defendant via telephone conversation. He filled out a "Bondsman Off Bond Form," indicating he would no longer act as the defendant's surety, although it may have been as much as a couple of hours after the defendant was taken into custody

before that paperwork was completed.[4] Detective Murphy explained that, in this instance, the defendant was "immediately surrendered because he was in our presence" when the surety indicated his desire to surrender the defendant and that he acted in "good faith" by detaining the defendant prior to getting the "Bondsman Off Bond Form" in hand.[5] Detective Murphy felt that he would have been "a little derelict" in his duties if he had refused to take the defendant into custody after the bondsman requested to be off the bond merely "because he wasn't physically there at that moment to produce a document."

Article 345 requires no particular action on the part of the surety in surrendering the defendant other than the surrender occur either in open court or be made to the officer charged with the defendant's detention. It can occur at any time, including prior to any forfeiture of the defendant's bond. The defendant's surety chose to make the surrender to the officer charged with the defendant's detention; *i.e.*, one employed by the Tangipahoa Parish Sheriff's Office, who was then required to take custody of him. The State acted within the authority established under Article 345 in taking the defendant into custody because the defendant was surrendered into their custody by the surety.[6] The State had no discretion to refuse, and the defendant was, thus, properly remanded into custody. **Kerrison**, 701 So.2d at 1348.

This assignment of error lacks merit.

CONSENT TO SEARCH

In his second assignment of error, the defendant contends that the consent given by his wife to search their residence was obtained unlawfully. He does not deny that she

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[4] Detective Murphy explained during the hearing on the suppression motion that the "Bondsman Off Bond Form" is used "[a]nytime a bondsman wants to get off of a bond." The usual course of action is that, once the form is completed, a "code" is placed in criminal records to indicate that the person should be booked back into the jail with their original bond amount. That person can be brought in by an agent of the bondsman or by a police officer.

[5] Detective Murphy also stated, "We were looking at him when the bondsman and I spoke."

[6] Former La. Code Crim. P. art. 338, which was replaced by the current Article 345, contained additional provisions with regard to a surety who surrenders a defendant who has not failed to appear or otherwise violated any order of the court. In that case, the surety had to refund to the defendant the total amount paid by the defendant to the surety for the bail bond. See former Article 338(D) (repealed by 1993 La. Acts No. 834, § 1, when Article 338 became Article 345, effective June 22, 1993). The Code of Criminal Procedure no longer governs bond disputes.

consented to the search. Rather, he argues, without citation to the record, that he and his wife "were at odds with granting the police a search of their residence" and that the police "ignored" his objections. However, this court finds no evidence in the record to support the assertion that the defendant objected to the search. Rather, the record is silent as to whether the defendant concurred in the consent given by his wife.

Citing **United States v. Matlock**, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), the defendant acknowledges that one individual may permit a search of a mutually-controlled area without gaining the other person's consent. He contends that the State must, however, show that the defendant was absent during the search. We find no authority to support this assertion.

Pursuant to La. Code Crim. P. art. 703(D), the State bears the burden of proof when a defendant files a motion to suppress evidence obtained without a warrant:

> On the trial of a motion to suppress filed under the provisions of this Article, the burden of proof is on the defendant to prove the ground of his motion, except that the state shall have the burden of proving the admissibility of a purported confession or statement by the defendant or of any evidence seized without a warrant.

Therefore, the State bears the burden of showing that a warrantless search and seizure is justified. A search conducted with consent is an exception to both the warrant and the probable cause requirements. **State v. Tennant**, 352 So.2d 629, 633 (La. 1977), cert. denied, 435 U.S. 945, 98 S.Ct. 1529, 55 L.Ed.2d 543 (1978).

The entire record is reviewable for determining the correctness of a ruling on a pretrial motion to suppress. **State v. Francise**, 597 So.2d 28, 30 n.2 (La. App. 1 Cir.), writ denied, 604 So.2d 970 (La. 1992). We give great weight to the trial court's ruling on a motion to suppress in regard to factual determinations, as well as credibility and weight determinations, while applying a *de novo* review to findings of law. See **State v. Peterson**, 2003-1806, p. 9 (La. App. 1 Cir. 12/31/03), 868 So.2d 786, 792, writ denied, 2004-0317 (La. 9/3/04), 882 So.2d 606.

In **Matlock**, 415 U.S. at 166, 94 S.Ct. at 990, the United States Supreme Court considered the validity of a warrantless search of a home when consent to search was given not by the defendant but by a co-occupant of the home. The defendant was

arrested in his front yard and taken to a waiting police car. The officers then asked the woman who lived in the home with the defendant for consent to search, and she granted it. **Matlock**, 415 U.S. at 166, 94 S.Ct. at 991. Similarly, in **Illinois v. Rodriguez**, 497 U.S. 177, 179, 110 S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990), a case upon which the defendant relies, the defendant was inside the residence but asleep at the time consent to search was obtained and he was not given a chance to object. The Court held in both cases that the co-tenant's consent was valid and that the subsequent search was lawful. **Rodriguez**, 497 U.S. at 183-189, 110 S.Ct. at 2799-2802; **Matlock**, 415 U.S. at 169-178, 94 S.Ct. at 992-996.

More recently, in **Georgia v. Randolph**, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), the Supreme Court considered the validity of a co-occupant's consent to search when another occupant was present *and objected to the search*. The Court determined that one co-tenant's desire to consent cannot prevail over a present and objecting co-tenant. **Georgia**, 547 U.S. at 114, 126 S.Ct. at 1523. The Court drew a fine line between the decisions of **Matlock** and **Rodriguez** and the holding in **Randolph**, stating: "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." **Georgia**, 547 U.S. at 121, 126 S.Ct. at 1527.

Here, there is some evidence that the defendant may have been present when consent to search was obtained from his wife. Detective Murphy testified that "[w]e actually spoke to his wife, she consented to the search, we did our thing, and before we left we transported [the defendant] to the Tangipahoa Parish Sheriff's Office, the jail." It is unclear whether he was placed in custody before or after consent was obtained. Regardless, there is no evidence that he ever objected to the search.

A very similar situation was considered recently by the second circuit court of appeal. **State v. Collins**, 44,248 (La. App. 2 Cir. 5/27/09), 12 So.3d 1069. In **Collins**, law enforcement officers were leaving the apartment of a purported victim when they were approached by the defendant. He was arrested and placed in a car. Officers then

went to his apartment, which was in close proximity to that of the victim, where the defendant's live-in girlfriend consented to a search of the apartment. The officers discovered marijuana and drug-distribution paraphernalia. **Collins**, 44,248 at 11, 12 So.3d at 1078.

The evidence presented in **Collins**, like here, was silent as to whether the officers removed the defendant from his home in an attempt to prevent him from objecting to a search, or whether they purposefully avoided seeking his permission by ignoring any objection by him. In other words, the record failed to show that the defendant had refused consent. **Collins**, 44,248 at 11-12, 12 So.3d at 1078. The record in this case likewise fails to show that the defendant objected. **Randolph**, therefore, does not extend to these facts. On the contrary, we find this factual scenario is much closer to that described in **Matlock**.

Furthermore, with regard to whether the police may have "removed" the defendant from the home to avoid his objection to consent, there is inadequate evidence to support this assertion. First, it is unclear whether the defendant was removed from the premises prior to his wife giving consent to search. Second, even if the evidence supported a finding that he was removed prior to the police seeking and obtaining consent to search, it does not support the contention that he was removed to avoid his objection to consent.

These facts are similar to those in **State v. Johnson**, 2008-1156 (La. App. 5 Cir. 4/28/09), 9 So.3d 1084, and **U.S. v. Hicks**, 539 F.3d 566 (7th Cir. 2008). In **Hicks**, the defendant and his girlfriend shared an apartment. The police, investigating a shooting, went to the apartment to obtain consent to search. Upon arrival, the police arrested the defendant on two outstanding arrest warrants and removed him from the premises. They then obtained consent to search from the girlfriend. The court found that the officers removed the defendant in order to arrest him, not in order to avoid his objection to the search. **Hicks**, 539 F.3d at 570. Relying on **Hicks**, the fifth circuit court of appeal held the same under nearly identical circumstances. **Johnson**, 2008-1156 at 10, 9 So.3d at 1091. Likewise, the officers in this case did not remove the defendant from his residence

to avoid his objection to the search, if in fact they did remove him. Rather, the officers legally remanded him into custody based upon a valid surrender by his surety. The defendant's wife's consent, absent any objection by the defendant, was sufficient to allow the officers to search the residence. We find no error in the trial court's denial of the defendant's motion to suppress evidence on this basis.

We find this assignment of error without merit.

JAILHOUSE STATEMENTS

In his third assignment of error, the defendant asserts that "the police planted a known jailhouse informant in his cell and encouraged this informant to start a conversation with [the defendant] to encourage him to say something that they could use to charge him with murder." He fails to provide any record citations to support this assertion.

When a defendant has been formally charged with a crime and has invoked his Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel, the government may not use an undercover agent or informant to circumvent these rights. **Massiah v. United States**, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); **Brewer v. Williams**, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); see also **State v. Brown**, 434 So.2d 399 (La. 1983). In **Massiah**, the Supreme Court ruled that the government overstepped constitutional bounds by outfitting an informant's car with a radio transmitter and arranging a meeting with the accused. **Massiah**, 377 U.S. at 202-204, 84 S.Ct. at 1200-1202. In reversing the conviction, the Supreme Court held that the Sixth Amendment prohibits deliberate elicitation by the government or its agents of incriminating information from a defendant after he has been indicted and in the absence of his counsel. **Massiah**, 377 U.S. at 205-206, 84 S.Ct. at 1202-1203.

The defendant relies upon **Massiah** to argue that placing Patrick in his cell violated his rights. However, this reliance is misplaced. The Court in **Massiah** found active governmental participation to elicit incriminating statements unlawful; in the instant case, there is no evidence of active involvement by the State. To the contrary, testimony during the suppression hearing reflects that the defendant and Patrick became cellmates

by sheer coincidence. As the trial court noted at the conclusion of the hearing, the evidence did not support a finding that Patrick was acting as an agent for law enforcement. Rather, the evidence reveals Patrick acted on his own and without the promise of any remuneration. Moreover, the defendant had not been charged with Galaforo's murder at the time he made the incriminating statements to Patrick.

In **State v. Hill**, 601 So.2d 684, 686 (La. App. 2 Cir.), writ denied, 608 So.2d 192 (La. 1992), the defendant was convicted of second degree murder for beating an elderly woman to death during the commission of a robbery. Similar to the instant case, the defendant admitted his role in the murder to his cellmate. On appeal, the defendant asserted that the trial court erred in denying the defense motion to exclude the testimony, alleging that the informant was placed in his cell for the purpose of eliciting incriminating information. **Hill**, 601 So.2d at 688. The second circuit court of appeal found this argument without merit, as no evidence was presented that the statements were not voluntary, that anyone asked the informant to obtain information from the defendant, or that the informant obtained anything of value in exchange for gathering or divulging information about the defendant. **Hill**, 601 So.2d at 689.

The facts in **Hill** are analogous to those present in this case. We cannot say that the trial court erred in denying the motion to suppress with regard to statements made by the defendant to Patrick. This assignment of error is without merit.

CONCLUSION

Having found no merit in the defendant's assignments of error, the conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.