IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

03-CR-78-S

ROBERT A. MYKYTIUK,

Defendant.

REPORT

Defendant Robert A. Mykytiuk, indicted on methamphetamine manufacturing charges, has moved to quash the search warrant issued for his residence in Cumberland, Wisconsin (Dkt. 10). Mykytiuk claims there was no probable cause and the warrant was too broad. It is a close call whether there was probable cause or whether the warrant was too broad, but the good faith doctrine saves this warrant in any event. Accordingly, I am recommending that this court deny Mykytiuk's motion.

The Search Warrant Affidavit

Although Mykytiuk asked for an evidentiary hearing on his motion, he has not shown the need for a *Franks* hearing,[1] so his challenge is limited to the four corners of the affidavit. (More on this in the analysis section).

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[1] *Franks v. Delaware,* 438 U.S. 154 (1978).

The search warrant affiant was Barron County Sheriff's Detective Jason Hagen who works on the Barron/Rusk Drug Enforcement Unit. On May 2, 2003, Detective Hagen sought a warrant to search Mykytiuk's property located at 2117 6¼ Street, Cumberland, Wisconsin, which consisted of a yellow two-story house and outbuildings. Hagen specifically wished to search for two five-gallon buckets containing muriatic acid, paint thinner, pseudophed, lithium batteries, Coleman fuel, and coffee filters. A copy of Detective Hagen's affidavit, which speaks for itself, is attached as Exhibit A to the affidavit of Attorney David Geier (dkt. 19). Detective Hagen swore to the following salient facts (which are not verbatim except for paragraph 5):

1) Detective Hagen is a sheriff's detective who works for the local drug enforcement unit.

2) Earlier that same day (May 2, 2003), Detective Hagen had executed a search warrant at the residence of Tim Soltau, and had found apparatus, chemicals and materials showing that Soltau manufactured methamphetamine.

3) Soltau agreed to cooperate. The agents offered no inducements or promises to Soltau to obtain his cooperation.

4) Soltau told the agents that he and Bob Mykytiuk had taken anhydrous ammonia from Tony Zappa's residence and stored it at Mykytiuk's residence at 2117 6¼ Street in Cumberland. Within the preceding three days, Soltau stole this anhydrous ammonia from Mykytiuk.

5) Soltau told the agents that:

> Mykytiuk manufactures methamphetamine and keeps necessary items for the manufacture of 'meth' in two five-gallon buckets that Mykytiuk ordinarily stores in vehicles at his residence. Such items would include muriatic acid, paint thinner, pseudofed [*sic*], lithium batteries, Coleman fuel and coffee filters.

6) Detective Hagen believes based on his training and experience that a person manufacturing methamphetamine ordinarily would possess methamphetamine and drug paraphernalia within his residence.

7) Soltau's statements can be considered truthful, credible and reliable to the extent to which they are admissions against interest.

See Dkt. 19, Exhibit A (The paragraph numbers are different here than in the affidavit).

Analysis

Mykytiuk argues that this court should quash the search warrant because: 1) it is not supported by probable cause; 2) it is overly broad; and 3) the police could not reasonably have believed that the facts set forth in the supporting affidavit were sufficient to support a probable cause finding. I deal with each contention in turn, after a review of Mykytiuk's request for an evidentiary hearing on his motion.

1. The *Franks* issue

Mykytiuk asked for an evidentiary hearing on his suppression motion, but the basis for the request is not clear from the supporting affidavit of his attorney (*See* Dkt. 19). To obtain a *Franks* hearing, Mykytiuk must establish by a "substantial preliminary showing" that: 1) the search warrant affidavit contained a false material statement, or omitted a material fact; 2) the affiant omitted the material fact or made the false statement intentionally, or with reckless disregard for the truth; and 3) the false statement is necessary to support the finding of probable cause (or any material omissions would have affected the court's decision to issue the warrant). *See United States v. Marrow*, 272 F.3d 817, 821 (7th Cir. 2001). These elements are hard to prove, which means that courts rarely hold *Franks* hearings. *United States v. Swanson*, 210 F.3d 788, 789 (7th Cir. 2000). Mykytiuk did not prove them here, so there was no need for a hearing.

Even so, the government did not oppose a *Franks* hearing and would have presented Detective Hagen for testimony had he not been unavailable due to recent, immobilizing leg injuries. As becomes clear from its responsive brief, the government welcomed this opportunity for Detective Hagen to clarify his "inartfully drafted" affidavit. *See* Government Response, dkt. 25 at 5. Mykytiuk takes exception to this in his reply brief, suggesting that the government is attempting to beef up Detective Hagen's insufficient warrant affidavit with a selective presentation of additional facts from equally laconic investigative reports. *See* dkt. 27. Mykytiuk points to competing inferences that could be drawn from some of the

reports, then frames this particular dispute as an example of officer recklessness. Mykytiuk uses this argument not just to attack probable cause, but also to convince this court not to apply the good faith doctrine as a safety net. See *United States v. Leon,* 468 U.S. 926 (1984).

Mykytiuk is half right: the government is not entitled to bolster Detective Hagen's affidavit by reference to outside materials, but to the same effect, Mykytiuk is not entitled to impeach that affidavit by reference to outside materials in the absence of a sufficient *Franks* showing.

Although there is some support for allowing the government to amplify the post-search record in order to correct a scrivener's error, *see United States v. Jones,* 208 F.3d 603, 605 n.1 (7th Cir. 2000), what the government seeks in this case is substantively different: it wants the opportunity constructively to redraft its warrant affidavit *nunc pro tunc* in order to clarify the agent's probable cause presentation to the issuing court. This is both unnecessary and unfair.

Constructive redrafting is unnecessary because the state court already found probable cause to issue the warrant and as discussed in the next section, this finding is presumptively correct. So long as the facts the government wishes to clarify can be fairly inferred from the affidavit actually presented to the state court, then a reviewing court should infer them in order to uphold the warrant.

Constructive redrafting is unfair because if, conversely, the facts the government wishes to clarify cannot be fairly inferred from the affidavit actually presented to the state

court, then the government's attempts to "clarify" would amount to post-hoc bolstering of probable cause. Although this would be improper, it is not quite as egregious as what Mykytiuk accuses the government of attempting: the government is not seeking to add new substantive facts to Detective Hagen's affidavit, it is inviting the court to use additional materials as a study guide when the court glosses the affidavit actually presented to the state court. I decline the invitation. Mykytiuk and the government both are stuck with the statements contained within the four corners of Detective Hagen's affidavit, along with any inferences that fairly can be drawn therefrom. *See, e.g., United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002).

2. Probable Cause

A court that is asked to issue a search warrant must determine if probable cause exists by making a practical, common-sense decision whether given all the circumstances, there exists a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001), quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982). To uphold a challenged warrant, a reviewing court must find that the affidavit provided the issuing court with a substantial basis for determining the existence of probable cause. In the Seventh Circuit, this standard is interpreted to require review for clear error by the issuing court. Reviewing courts are not to invalidate a warrant by interpreting the affidavits in a hypertechnical rather than a common sense manner. *Id.*

Put another way, a court's determination of probable cause should be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the court reasonably could conclude that the items sought to be seized are associated with the crime and located in the place indicated. Doubtful cases should be resolved in favor of upholding the warrant. *United States v. Quintanilla*, 218 F.3d 674, 677 (7th Cir. 2000), quoting *United States v. Spry*, 190 F.3d 829, 835 (7th Cir. 1999), *cert. denied*, 528 U.S. 1130 (2000).

The Supreme Court has declined to define "probable cause" precisely, noting that it is a commonsense, nontechnical concept that deals with the factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians, act. *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Despite the lack of a firm definition, the Supreme Court tells us that probable cause to search exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Id.* at 696, citations omitted. Probable cause is a fluid concept that derives its substantive content from the particular context in which the standard is being assessed. *Id.*, citations omitted.

"Probable cause requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity." *United States v Roth*, 201 F.3d 888, 893 (7th Cir. 2000), *quoting Illinois v. Gates*, 462 U.S. 213, 244 (1983); *see also United States v. Ramirez*,

112 F.3d 849, 851-52 (7th Cir. 1997)("all that is required for a lawful search is *probable* cause to believe that the search will turn up evidence or fruits of crime, not certainty that it will") (emphasis in original). Although people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely. *See United States v. Garcia,* 179 F.3d 265, 269 (5th Cir. 1999); *see also Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting) (probable cause exists somewhere below the 50% threshold).

Where informants are involved to establish probable cause, the Seventh Circuit suggests that a court assess their credibility by considering four factors: (1) firsthand observation by the informant, (2) the degree of detail provided by the informant, (3) corroboration of the informant's information by the police, and (4) testimony by the informant at a probable cause hearing. *United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001)*; see also United States v. Koerth*, 312 F.3d at 866. As is routine in federal court, in this case the fourth factor disappears immediately; however, no one factor is dispositive in the credibility analysis, and a deficiency in one may be compensated by a strong showing of another. *United States v. Brack*, 188 F.3d 748, 756 (7th Cir. 1999).

Courts must be skeptical of informants like Soltau: "A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation." *Williamson v. United States*, 512 U.S. 594, 607-08 (1994)

(Ginsberg, Blackmun, Stevens and Souter, JJ. concurring in part and concurring in the judgment). The Ninth Circuit was more blunt:

> By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.
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> * * *
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> Criminals caught in our system understand they can mitigate their own problems with the law by becoming a witness against someone else. Some of these informants will stop at nothing to maneuver themselves into a position where they have something to sell.

United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir. 1993). Which is not to say that informants like Soltau don't play a valuable role in helping the police root out crime, *id.* at 334-35, but their value depends on the police and the courts ensuring the integrity of the system by closely scrutinizing them and their claims. *Id.*

That said, the Seventh Circuit has noted that an informant's cold-blooded self-interest actually could make him *more* trustworthy because his desire to obtain the best available deal with the police is a strong incentive to provide accurate and specific information rather than false information. *Koerth*, 312 F.3d at 870. Additionally, statements against penal interest, even by informants, are presumed reliable. *See* Fed. R. Ev. 804(b)(3); *United States v. Harris*, 403 U.S. 573, 583 (1971); *United States v. Leidner*, 99 F.3d 1423, 1423-30 (7th Cir. 1996). An informant's credibility increases when he admits having

engaged in additional prior criminal acts with the suspect. *United States v. Leidner*, 99 F.3d at 1430. Similarly, the more explicit and detailed an informant's first-hand information, the more weight the courts should give it. *Id.*, citations omitted.

In this case, Soltau provided fresh, detailed, self-incriminating information from which the state court easily could surmise that he was in a position to know of what he spoke. *See, e.g., United States v. Johnson*, 289 F.3d 1034, 1039 (7th Cir. 2002) ("[W]e have often repeated that first-hand observations by a CI support a finding of reliability"); *United States v. Leidner*, 99 F.3d at 1430 ("Even if we entertain some doubt as to an informant's motives, his explicit and detailed description of the alleged wrongdoing, along with a statement that the event was observed first hand, entitles his tip to greater weight than might otherwise be the case") (quoting *Illinois v. Gates*, 462 U.S. 213, 234 (1983)).

As for the remaining prong of the informant reliability test, Detective Hagen presented absolutely no information that independently corroborated anything that Soltau said about Mykytiuk. So what we've got is an identified but untested informant caught *in flagrante delicto* who then spills all over one of his partners in a manner that further inculpates the informant.

It was good police work, as far as it went, but it wasn't–and isn't–enough to support a search warrant. There are no apparent differences between the affidavit presented here and that found deficient by this court (and the Seventh Circuit) in *United States v. Koerth*, 312 F.3d 862. As noted in *Koerth* by Judge Coffey,

> To uphold the state judge's ruling in this case would be to ratify the search of a home based on the use of essentially conclusory statements without corroboration. Although the task force agents are to be commended for ferreting out and apprehending the defendant in this case, we refuse to water down the probable cause standard in the name of fighting crime.

312 F.3d at 868.[2] Even taking into account the presumptive correctness of the state court's decision to issue the warrant, the police did not provide enough information to the court to establish probable cause to search Mykytiuk's residence.

Before determining whether the good faith doctrine rescues this warrant, the court needs to address Mykytiuk's additional challenge to the breadth of the warrant.

3. Overbreadth of the Warrant

According to Mykytiuk, Soltau figuratively placed Mykytiuk's contraband meth lab in a pair of five gallon buckets in the back of Mykytiuk's truck. Mykytiuk contends that although it might have been reasonable to issue a warrant for his truck and buckets, it was unreasonable to expand the warrant to include his house and out buildings. This is the point on which the government wished to "clarify" Detective Hagen's affidavit. As noted above,

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[2] In this court's report and recommendation finding the *Koerth* warrant affidavit insufficient, I reviewed similar cases in this circuit and concluded that no warrant affidavit had been upheld on such scant evidence. *See, e.g., United States v. Reddrick*, 90 F.3d, 1276, 1280-81 (7th Cir. 1996); *United States v. Jones*, 208 F.3d 603, 606, 609 (7th Cir. 2000); *United States v. Quintanilla*,218 F.3d 674, 677 (7th Cir. 2000). In each of these cases the police had additional material evidence to present to the court in addition to the informant's say-so. In each case the court implies (but does not hold) that the absence of the additional evidence would doom the challenged warrant.

the government is not entitled to do this, but it doesn't need to because the warrant was not unreasonably broad.

Detective Hagen stated in his affidavit that

> Mykytiuk manufactures methamphetamine and keeps necessary items for the manufacture of 'meth' in two five-gallon buckets that Mykytiuk ordinarily stores in vehicles at his residence.

This sentence is susceptible to two reasonable interpretations. The first is that Mykytiuk manufactures methamphetamine *in* the buckets *and* keeps his cooking ingredients and equipment in the buckets as well. The second is that Mykytiuk manufactures methamphetamine somewhere, but not necessarily in the bucket, and he stores his meth-cooking ingredients and equipment in the buckets.

The second interpretation is more reasonable and this court should adopt it. First, the state search warrant is presumed valid; therefore, this court must assume that this is the interpretation adopted by the state court because this is the interpretation that would support the warrant issued by the court. Second, this interpretation makes more practical sense: it is unlikely that anybody actually could–or would choose to–cook methamphetamine *inside* a five gallon bucket.[3] Store the gear in the bucket for convenience and mobility, sure, but then take it out to use it.

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[3] Detective Hagen doesn't explain how meth is manufactured and this court is not going to expand the record to discuss this, but common sense almost forces the inference that a meth cooker could not adequately assemble and process the ingredients listed in the affidavit (muriatic acid, paint thinner, pseudoephedrine, lithium batteries, Coleman fuel, coffee filters and anhydrous ammonia) in the cramped confines of a five-gallon bucket.

Apart from this, there are two important facts that apply regardless how one interprets the disputed sentence. First, according to Soltau, the buckets "ordinarily" are in the truck. This means that they're not always there. This is additional support for the inference that Mykytiuk took the gear out of the buckets to manufacture methamphetamine. Therefore, Detective Hagen had probable cause to search anywhere on the premises that the buckets (or their contents, or part of their contents) might be. Second, according to Detective Hagen, people who manufacture methamphetamine ordinarily would keep the finished product and drug paraphernalia in their residence. This is a conclusory declaration, but it's reasonable, and Detective Hagen offers it on the basis of his work and training in the field. It is entitled to some weight in determining whether the state court issued a warrant that was unreasonably broad. So even if the searching agents found two buckets in the trucks, they still would have a reason to continue their search to look for finished product and other paraphernalia.

In short, the warrant was not too broad. Even if it were too broad, the government is entitled to argue that the good faith doctrine applies to the scope of the warrant as well.

4. Good Faith

Mykytiuk's last point is that the officers could not have believed that the warrant issued by the state court was valid. This is a fallback argument that the court only reaches in the event it finds that probable cause is lacking, which is exactly where we have landed. *See United States v. Garey*, 329 F.3d 573, 577 (7th Cir. 2003).

In *United States v. Leon,* 468 U.S. 926 (1984) the Court held that:

> In a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.
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> * * *
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> We have . . . concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination. Deference to the magistrate, however, is not boundless.

Having so stated, the Court then held that

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Id. at 926 (1984).

Such determinations must be made on a case-by-case basis with suppression ordered "only in those unusual cases in which exclusion will further the purpose of the exclusionary rule." 468 U.S. at 918. When the officer's reliance on the warrant is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule because it is

> painfully apparent that the officer is acting as a reasonable officer would and should act in similar circumstances. . . . This is particularly true . . . when an officer acting with objective good faith has obtained a search warrant from a judge . . . and acted within its scope. . . . Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the [court's] error rather than his own cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 920-21, internal quotations omitted.

The Court noted the types of circumstances that would tend to show a lack of objective good faith reliance on a warrant, including reliance on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or reliance on a warrant so facially deficient that the officer could not reasonably presume it to be valid. *Id*. at 923. The Court observed that "when officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *Id*. at 924. *See also Arizona v. Evans*, 514 U.S. 1, 11-12 (1995)(reaffirming the Supreme Court's reluctance to suppress evidence obtained in good faith but in violation of a defendant's Fourth Amendment rights).

Here, Mykytiuk has not established that the police were dishonest or reckless regarding their report of Soltau's statements implicating Mykytiuk in meth cooking. Detective Hagen could have done a better job marshaling his facts, but his affidavit was not barebones, and there is no claim that the circuit court judge abandoned her neutral or detached role. In light of all this, it was not unreasonable for the police to assume that the

warrant was valid. Therefore, even in the absence of probable cause, suppression is not appropriate because the police acted in good faith.

Shouldn't Detective Hagen and his colleagues have known from *United States v. Koerth* that the warrant affidavit was deficient, or at least suspect, and shouldn't this imputed knowledge block any claim of good faith in this court? No and no. Although the Seventh Circuit in *Koerth* imputes some legal knowledge to agents seeking search warrants, the Supreme Court made it clear in *Leon* that the issuing court is the actual gatekeeper. Once the court issues the search warrant, an agent should be able to rely on it unless his affidavit was so deficient that it merits the "bare bones" label. Detective Hagen's warrant application was not so lacking in indicia of probable cause as to render reliance on the warrant issued by the court unreasonable. Similarly, there was more than bare bones support for his request to search the premises beyond the buckets and the truck. In light of this, there was nothing more Detective Hagen could have done in seeking to comply with the law. *Leon*, 468 U.S. at 921.

Conclusion

This is another wobbler warrant in which probable cause appears to be lacking, but it's a close enough case that the government should get the benefit of the good faith doctrine. The regular appearance in this court of such warrants is not an encouraging development in this district's fourth amendment jurisprudence.

The United States Attorney for this district routinely prosecutes drug cases investigated by non-federal regional drug task forces. To paraphrase Judge Coffey in *Koerth*, these task force agents are to be commended for rooting out crime in their communities, but they may not do so in violation of the Bill of Rights. A measurable percentage of these task force cases (including some currently before the court) contain deficient police work. If the government wishes to continue to bring these cases federally, it should start screening them more carefully and/or start providing more training to state and county agents so that a de facto double standard doesn't develop. State and county agents are capable of providing the same high quality work as the DEA, FBI, ATF and other federal investigative agencies, and that is the quality of work that should undergird federal drug prosecutions.

That said, I am recommending that this court uphold the challenged warrant on the basis of the good faith doctrine and deny Mykytiuk's motion to quash and suppress.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Robert Mykytiuk's motion to quash the search warrant.

Entered this 24th day of October, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge