

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

LANCE SLIZEWSKI,

Defendant.

OPINION & ORDER

14-cr-87-jdp

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Defendant, Lance Slizewski, is charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Police found the firearm in the 2014 Chevrolet Impala that defendant had been renting. Police impounded and then searched the vehicle pursuant to a warrant issued by the Wisconsin Circuit Court for Dane County. Defendant moves to suppress this evidence on the grounds that the affidavit supporting the warrant contained material omissions made in reckless disregard of the truth. Dkt. 20 and Dkt. 23. The magistrate judge issued a Report and Recommendation that defendant's motion be denied. Dkt. 31. Defendant objects essentially on the same grounds asserted in his motion. Dkt. 33.

Pursuant to 28 U.S.C. § 636(b)(1) and this court's standing order, I am required to review de novo the objected-to portions of the Report and Recommendation. The Report and Recommendation accurately summarizes the background facts, so I do not need to repeat them here. I also do not need to rehearse the basic probable cause standard, because defendant does not challenge the common-sense, totality-of-the-circumstances probable cause standard explained and applied in the Report and Recommendation. Dkt. 31, at 9-11. Defendant objects that certain facts omitted from the affidavit are so important that they undermine the probable cause determination, and that the omission of those facts show that the officer who made the affidavit did so in reckless disregard of the truth, requiring a *Franks* hearing. I will adopt the

recommendation that defendant's motion to suppress be denied. Because I also adopt the reasoning of the Report and Recommendation, I will not rehearse the entire analysis again. I will address what I take to be defendant's main points in his objection.

I start by pointing out what defendant does not appear to challenge. The affidavit in support of the warrant, made by Madison police detective Joel Peterson, contains ample information tying James "Jay" Sexton to a series of armed robberies, some of which he committed with an accomplice. The affidavit also ties certain items of clothing to Sexton, particularly a pair of gray and white basketball shoes and a red St. Louis Cardinals baseball cap with a black bill. Sexton is linked to defendant by his cell phone, which showed repeated calls to "Lance" at a number linked to defendant, and by a number of jail calls from Sexton to defendant's number. When defendant was arrested, gray and white basketball shoes and a red St. Louis Cardinals baseball cap with a black bill were visible in the back seat of his car, a rented black Impala.

This informational armature alone would be enough to establish probable cause to search the Impala for evidence linking Sexton to the armed robberies. Sexton had been in regular touch with defendant before and after Sexton's arrest, so there is a good chance that the somewhat distinctive shoes and baseball cap in defendant's car might be items that Sexton wore while preparing for the robberies or during the robberies themselves. Thus, there was a fair probability that some of Sexton's property or other items from the robbery might be in the car. Bearing in mind that probable cause is a low evidentiary threshold, a reasonably prudent person would recognize a fair probability that the Impala might contain evidence related to the robberies. *See Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013).

Defendant contends that Det. Johnson built up the affidavit with incomplete or misleading information, and that if the full facts had been disclosed, a reasonable judicial officer

would not would have issued the warrant. The Report and Recommendation characterized defendant's argument as picking at details, or, borrowing a metaphor from *United States v. Swanson*, 210 F.3d 788, 790 (7th Cir. 2000), throwing pebbles at a tank. But to be fair to defendant, he needs to make his argument by citing specifics. The question is whether these specifics add up to more than mere pebbles, something weightier that raises serious concerns with the integrity of the affidavit. Defendant would be entitled to a *Franks* hearing if he makes a substantial preliminary showing of two elements: (1) a material falsity or omission that would alter the probable cause determination, and (2) a deliberate or reckless disregard for the truth. *United States v. Glover*, 755 F.3d 811, 820 (7th Cir. 2014).

The centerpiece of defendant's argument is this statement in the affidavit:

The vehicle [defendant's Impala] bears a strong resemblance to the vehicle that was seen on surveillance video as casing the Player's Sports Bar & Grill prior to the robbery.

Dkt. 24-1, at 4. Defendant contends that this statement wrongly implicates defendant's car in the Player's robbery, and that without it, a reasonable judge would not issue a warrant to search defendant's car.

I reject defendant's contention that this statement is false because "any assertion that they are 'similar' is not supported by the facts." Dkt. 33, at 5. The black sedan in the surveillance video is very similar to defendant's Impala, which is also a black sedan. Neither car is very distinctive. Compare Dkt. 20-3 to 20-4. But in side-by-side comparison of the photographs, it is clear enough that the car in the surveillance video is not defendant's Impala. If the identity of defendant's car as the one in the surveillance video was required to establish probable cause, I might be concerned that Det. Peterson had tried to mislead the judge into issuing the warrant. But this statement is simply not the lynchpin that defendant tries to make it, because there was other information linking defendant's Impala to Sexton's property. "[A]n

unimportant allegation, even if viewed as intentionally misleading, does not trigger the need for a *Franks* hearing.” *Swanson*, 210 F.3d at 790. The affidavit does not need to link defendant or his car to the robberies; the critical point is that Sexton’s property is linked to defendant’s Impala.

Defendant’s other argument about the Impala—that the affidavit does not show whether it is similar to a Malibu—is even less persuasive. An eyewitness, fleeing the Wing Stop robbery, said that the suspect left the scene in a black sedan similar in style to a Chevrolet Malibu. Defendant complains that Det. Peterson did not submit anything in the affidavit to establish that a Malibu is similar to an Impala. Whatever a Malibu actually looks like, as a black sedan it is at least somewhat similar to defendant’s Impala. But we are dealing with an eyewitness account here, so a reasonable officer would not discount the witness’s information even if a Malibu did not look any more like an Impala than any other black sedan. I also note, as the Report and Recommendation put it, that the Malibu is the Impala’s “little brother” in the Chevrolet model line-up, which suggests a family resemblance between a Malibu and an Impala. But once again, the critical point is that Sexton’s property is linked to whatever car defendant was driving. To address defendant’s point directly: there would be probable cause to search defendant’s car even if it had been a white Torino.

Defendant’s argument about the basketball shoes expects too much precision from witness accounts. Witness Marquell Hatchett reviewed the security video of the Pizza Extreme robbery and told Det. Peterson that the suspect was wearing the same shoes that Sexton wore during the Market Basket robbery. Hatchett identified the shoes as “gray Jordans.” Det. Peterson stated in the affidavit that a pair of gray and white basketball shoes were in plain sight on the floor of defendant’s Impala. The basketball shoes are an important part of the probable

cause determination: with the Cardinals baseball cap, they provide a link between defendant's car and Sexton's property.

Defendant contends that Det. Peterson knew but failed to disclose that the shoes in defendant's car were not actually "Jordans," but another Nike model, LeBron Soldier Vs. Defendant's argument is that Det. Peterson must have known that the LeBron Soldier Vs in defendant's car were not Sexton's Jordans. After all, the LeBron Soldier Vs were instantly recognizable to the clerks at Foot Locker, in part because the LeBrons do not have the well-known Air Jordan logo. Dkt. 24, ¶¶ 24-28. But no one would expect either Hatchett or Det. Peterson to be as attuned to the various models of Nike basketball shoes as the clerks at Foot Locker. Even if Det. Peterson had noted the absence of the Air Jordan logo, it was reasonable for him to think that the gray and white basketball shoes in the Impala might be the ones that Hatchett had identified as Sexton's, despite Hatchett's referring to them as "Jordans." Det. Peterson's failure to include the fine points of Nike branding raises no implication that he had intentionally or recklessly falsified his affidavit.

The booking photo does not add much to the probable cause analysis. A witness identified one of the suspects in the Player's robbery as a light-skinned black man or of "mixed race." The race of the suspect does not add much affirmative evidence in support of a probable cause determination because the focus of the analysis is on the Impala and not on defendant himself. The affidavit does not expressly state that Det. Peterson thought that defendant was the second suspect in the Player's robbery. Although that might be one inference that could be drawn from the affidavit, that implication is not a prominent part of the affidavit. If any reference to defendant's racial appearance were omitted, the affidavit would still demonstrate probable cause. *C.f. United States v. Hoffman*, 519 F.3d 672, 676 (7th Cir. 2008) (denying *Franks*

hearing; probable cause established even if the challenged statements were excised from the affidavit).

Nevertheless, defendant's appearance could provide evidence that would disconfirm any implication that defendant was the second suspect. The affidavit may not intentionally or recklessly omit material exculpatory information. *Glover*, 755 F.3d at 820. Defendant contends that Det. Peterson's failure to include defendant's booking photo is a material omission of exculpatory information because the photo would have rebutted the implication that defendant was the second suspect. The question here is not defendant's actual racial heritage, nor is it whether I would describe defendant as black or biracial. The question is whether the robbery witness *could have thought* that defendant was a light-skinned black man or of mixed race. If the answer were "no," defendant's booking photo would be at least somewhat exculpatory. But the answer is "yes": defendant's appearance in his booking photo does not rule out the possibility that a witness saw him at the scene and thought he was a light-skinned black man or of mixed race. Thus, even if defendant's booking photo had been presented with the affidavit, it would have had no material effect on the probable cause determination.

I have reviewed defendant's other arguments, which were made in his original motion papers but were not meaningfully elaborated in his objections to the Report and Recommendation. I conclude that the Report and Recommendation correctly analyzed these arguments.

#### ORDER

IT IS ORDERED that the magistrate judge's March 24, 2015, recommendation is ADOPTED and defendant Lance Slizewski's motions to suppress evidence, Dkt. 20 and Dkt. 23, are DENIED.

Entered April 13, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON  
District Judge