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

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATHAN J. MORRIS and VIRENA L. OUSLEY,

Defendants.

OPINION & ORDER

15-cr-139-jdp

---

Defendants, Nathan J. Morris and Virena L. Ousley, are charged with multiple counts of controlled substance offenses. Two motions are before the court. First, Morris has moved to suppress the evidence gathered during the execution of a state search warrant. Dkt. 26. (Defendant Ousley joined this motion. Dkt. 27.) Second, Morris has moved for a *Daubert* hearing, Dkt. 54, to challenge the admissibility of the expert testimony of Detective Joel Wagner of the Dane County Sheriff's Department.

## MOTION TO SUPPRESS

Morris moves to suppress the fruits of a search of his apartment. Magistrate Judge Crocker has issued a Report and Recommendation that the motion be denied. Dkt. 61.

The Report and Recommendation provides a careful exposition of the facts, which are mostly unchallenged, so they do not need to be repeated in full here. The search warrant in this case was issued by Judge Amy Smith of the Dane County Circuit Court based on an affidavit by Detective Peter Grimyser of the University of Wisconsin—Madison Police Department, working as a member of the Dane County Narcotics Task Force. The affidavit relies on a confidential informant, CI 440, who Det. Grimyser reported "has previously

worked for [the Task Force] and has provided truthful and reliable information in the past." But in 1998, CI 440 had been "deactivated" as an informant because he had been deemed unreliable by the Task Force, a fact that Det. Grimyser left out of his affidavit. Morris moves to suppress the fruits of the search under *Franks v. Delaware*, 438 U.S. 154 (1978), arguing that the warrant was invalid because Det. Grimyser had intentionally left out several pieces of information material to CI 440's credibility.

If a warrant application relies on information provided by a confidential informant, "information about the informant's credibility or potential bias is crucial." *United States v. Glover*, 755 F.3d 811, 816 (7th Cir. 2014). Whether to issue the warrant is a decision that must be made "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 815-16 (quoting *Illinois v. Gates*, 462 U.S. 213, 240 (1983)). A defendant is entitled to a hearing under *Franks* if he makes a substantial preliminary showing that a law enforcement officer acted with intentional or reckless disregard for the truth in omitting material information about a confidential informant's credibility. *Id.* at 819-20. At the hearing, the defendant bears the burden to show by a preponderance of the evidence that the officer acted intentionally or with reckless disregard for the truth in omitting the information. *Id.* If the defendant makes this showing, then the court must reconsider whether the affidavit would establish probable cause if the omitted information were included. *U.S. v. McMurtrey*, 704 F.3d 502, 509 (7th Cir. 2013).

The magistrate judge deemed Morris to have made the requisite preliminary showing and granted Morris's request for a *Franks* hearing. Dkt. 39. After the *Franks* hearing, and with the benefit of post-hearing briefing, the magistrate judge found that Det. Grimyser was

believable, that he did not deliberately or recklessly misstate or mischaracterize information in the warrant affidavit, and that he did not deliberately or recklessly omit any information for the purpose of misleading the state court judge who issued the warrant. The magistrate judge agreed that some of Det. Grimyser's decisions about what to include in the warrant affidavit were wrong under federal standards, but the magistrate found that Det. Grimyser sincerely intended to follow the rules as he understood them. In light of the findings that Det. Grimyser did not intentionally or recklessly mislead the state court judge, the magistrate judge concluded that Morris had not met his burden under *Franks*, and he recommends that I deny the suppression motion.

Morris objects to the Report and Recommendation, essentially standing on the arguments presented to the magistrate judge.[1] Dkt. 63. 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. I may take additional evidence or rehear the evidence on which the magistrate judge based his decision, but I am not required to do so. *United States v. Raddatz*, 447 U.S. 667, 674 (1980) ("It should be clear that on these dispositive motions, the statute calls for a de novo determination, not a de novo hearing."). I have reviewed the transcript of the *Franks* hearing and the exhibits submitted in connection with the hearing. Morris does not allege that the hearing was defective in any way, and he gives me no reason to question the magistrate judge's credibility determination, so I will adopt it and accept that Det. Grimyser testified truthfully at the *Franks* hearing.

[1] Ousley has not directly objected to the Report and Recommendation. But she has entered a plea agreement, Dkt. 64, in which she reserves her right to appeal the denial of the suppression motion, which she had previously joined.

The one factual issue that Morris raises is whether Det. Grimyser reviewed the audio recordings of the controlled buys *before* he prepared the warrant affidavit. The record is not perfectly clear on this point. Det. Grimyser testified that he reviewed the recordings and that they corroborated CI 440's statements. Dkt. 44, at 32:5-18, 33:22-34:4. This testimony comes in response to questions by the government about what Det. Grimyser meant by certain statements in the affidavit, so the most natural interpretation of his testimony is that he listened to the recordings before preparing the affidavit. On cross examination, Morris's counsel did not ask Det. Grimyser when he listened to the recordings before drafting the warrant affidavit. So I am not persuaded by Morris's contention that there is no evidence that Det. Grimyser listened to the recordings before he got the warrant. Dkt. 63, at 7-8. The record suggests that he did. The Report and Recommendation cites the audio recordings to show that Det. Grimyser left out information that supported CI 440's credibility as well as information that undermined it.[2] The magistrate judge concluded, relying in part on the omission of the audio recordings, that Det. Grimyser did not intend to mislead Judge Smith.

I accept the magistrate judge's fact-finding, but I do not adopt the conclusion that the magistrate judge drew from the hearing testimony. Det. Grimyser knew that CI 440 had been deemed unreliable by the task force in 1998, but he consciously decided not to include that information in his search warrant affidavit. When asked why he did not include this information, Det. Grimyser had no real answer. Dkt. 44, at 33:15-21. At several points, Det. Grimyser explained that he prepared the warrant affidavit as he had been trained and according to department policy. That might explain his decision to not include CI 440's

[2] I also agree with the Report and Recommendation that the audio recordings would definitively establish probable cause for the warrant, even if CI 440 had been plucked from Dante's ninth circle, as the magistrate judge so evocatively put it.

criminal history or his motive.[3] But he could not rely on his training or department policy to explain his decision to omit CI 440's deactivation for being unreliable. As he put it, "No one in my office had, at that time, had done a similar thing, so it was kind of unchartered territory. And, you know -- yeah." Dkt. 44, at 33:19-21. At no point did Det. Grimyser try to justify the omission as an error caused by hasty preparation of the warrant affidavit, necessitated by the already scheduled execution of the warrant.

Det. Grimyser also knew, as a matter of policy, that credibility information was important to the issuing judge, which is why he expressly stated in the affidavit as he drafted it that CI 440 "has provided truthful and reliable information in the past." And when the warrant affidavit was presented to the judge, the judge required Det. Grimyser to insert *additional* hand-written information to buttress the determination that CI 440 was credible. At the hearing, Det. Grimyser conceded that CI 440's deactivation by the Task Force was an unusual circumstance that a judge might want to know about. Dkt. 44, at 87:7-17. The conclusion is inescapable: Det. Grimyser intentionally withheld information material to CI

[3] Det. Grimyser's decision to completely omit all of CI 440's criminal history is questionable, to put it mildly. *See United States v. Musgraves*, No. 15-2371, 2016 WL 4011172, at *3 (7th Cir. July 27, 2016). Det. Grimyser's explanation for the omission seems reasonable; protecting one's CI is certainly a reason to withhold what may be identifying information. But a CI's safety cannot, without exception, trump the importance of including crucial information concerning the CI's credibility, especially when the affiant is able to include the information without giving away the CI's identity, and especially because the impartial magistrate should have access to all material credibility information. That being said, I cannot find that Det. Grimyser omitted CI 440's criminal history to intentionally or recklessly deceive the magistrate.

The same may be said of a CI's purported motive. The information is often crucial to the magistrate's credibility determination. But here, nothing in the record suggests that Det. Grimyser withheld information concerning CI 440's motive to intentionally or recklessly deceive the magistrate.

440's credibility from the issuing judge, knowing that CI 440's credibility was critical to the legitimacy of the warrant.

I accept the magistrate judge's finding that Det. Grimyser did not intend to mislead the issuing judge, but only in the sense that Det. Grimyser sincerely believed that CI 440 was credible about what went on in Morris's apartment, or at least credible enough under the tight control that Det. Grimyser asserted over him. But Det. Grimyser did draft an affidavit with misleading omissions, purposefully withholding important credibility information from the issuing judge to prevent her from reaching an adverse credibility determination. Det. Grimyser may have earnestly believed that he was simply ensuring that the judge reached the correct conclusion. But Det. Grimyser was not entitled to arrogate to himself the determination that CI 440 was credible. That defeats the whole point of having the search warrant issued by a neutral magistrate. *See Gates*, 462 U.S. at 240. The determination that CI 440 was credible enough to support the search warrant, despite his previous deactivation, was Judge Smith's call, not Det. Grimyser's. Det. Grimyser's intentionally deceptive withholding of CI 440's sketchy history prevented Judge Smith from actually appraising his credibility.

In *Glover*, the Seventh Circuit held that:

> The complete omission of information regarding [the informant's] credibility is insurmountable, and it undermines the deference we would otherwise give the decision of the magistrate to issue the search warrant.

755 F.3d at 816. Det. Grimyser did not completely omit credibility information about CI 440. But he included only the favorable information while omitting all the unfavorable. Arguably that is worse than saying nothing about CI 440's credibility, because the lack of detail might prompt inquiry from the issuing judge, whereas a one-sided presentation will

avoid inquiry. I conclude that Morris has made the first part of the *Franks* showing by a preponderance of the evidence.

For the second part of the *Franks* analysis, I must consider whether the warrant affidavit would establish probable cause if it were supplemented with the omitted credibility evidence.[4] Morris has provided only a bare bones argument on this question. Probable cause is not a demanding standard: the warrant affidavit must establish only that based on the totality of the circumstances, the issuing judge can make a common-sense determination that there is a fair probability that evidence of a crime will be found in a particular place. *United States v. Mullins*, 803 F.3d 858, 861 (7th Cir. 2015) (citing *Gates*, 462 U.S. at 238), *cert. denied*, 136 S. Ct. 1230 (2016).

Here, I agree with the magistrate judge: there is ample support for probable cause to search Morris's residence. True, CI 440 had credibility issues, including a lengthy criminal history, but so do many confidential informants. The worst of it—the 1998 deactivation—was old. And these shortcomings must be balanced against a series of other factors that inform the impartial magistrate's probable cause determination. *See Musgraves*, 2016 WL 4011172, at *3 ("When a defendant challenges probable cause for a search warrant based on an informant's report, we consider the totality of the circumstances, focusing on five non-exclusive factors: (1) the level of detail, (2) the extent of firsthand observation, (3) the degree of corroboration, (4) the time between the events reported and the warrant application, and (5) whether the informant appeared or testified before the magistrate." (citation and internal

[4] Although I determined that Det. Grimyser did not omit CI 440's criminal history or motive with intentional or reckless disregard for the truth, *see* n.3, *supra*, I will nevertheless add these omissions back in, so to speak, for purposes of the probable cause analysis. The inclusion of *all* of CI 440's damaging credibility information still does not change the fact that the affidavit establishes probable cause.

quotation marks omitted)). This affidavit does not want for corroboration: law enforcement independently confirmed much of CI 440's detailed background information about the Morris case, particularly that Morris and Ousley lived in Apartment 4. Most important, CI 440 made two tightly controlled buys at Morris's apartment building. Law enforcement searched CI 440 before each buy to confirm that he did not have drugs on him, and they watched CI 440 enter and leave the apartment building each time.

As Morris points out in his objection to the Report and Recommendation, law enforcement officers had to trust what CI 440 said about what happened once he entered the apartment building. But under the totality of the circumstances here, all that Det. Grimyser really needed from CI 440 was that he got the drugs from Apartment 4. And Det. Grimyser was able to partially corroborate even this statement, as he observed CI 440 wave his hand toward Apartment 4's windows before he entered the building to make the first buy. CI 440's detailed descriptions and observed actions do not establish that to a metaphysical certainty, but they are enough for probable cause. (And I do not consider here the corroborating evidence that was not included in the warrant affidavit, notably the surveillance camera on one of the Apartment 4 windows and the audio recording of the controlled buys. With this information, probable cause would be beyond reasonable debate.) I conclude that even if all of CI 440's baggage had been disclosed in the warrant affidavit, the warrant would establish probable cause for the search of Morris's apartment. The motion to suppress will be denied.

One final comment: No one expects a confidential informant to be an Eagle Scout, but when all the damaging background is withheld from the issuing judge, a warrant based on the informant's information is in peril, and it will get close review in this court.

## MOTION FOR DAUBERT HEARING

Morris has moved for a hearing under *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579 (1993), to challenge the admissibility of expert testimony from Detective Joel Wagner of the Dane County Sheriff's Department. Dkt. 54. Det. Wagner has been disclosed by the government to testify, based on his training and experience as a law enforcement officer, that items found in Morris's apartment indicate drug distribution, not personal use. Dkt. 35.

Morris is correct that under *Daubert*, the court serves as a gatekeeper to ensure that only testimony based on reliable principles and methods by a qualified expert is admitted. When the testimony involves scientific or technical expertise, the *Daubert* inquiry can be searching and complex. But the inquiry must be tailored to the needs of the expert, and when an expert testifies on the basis of practical experience, the inquiry is a relatively simple one.

As the government has pointed out, there is ample circuit precedent allowing law enforcement officers to offer expert testimony concerning the methods of drug dealers. Dkt. 60, at 5 (citing *United States v. Winbush*, 580 F.3d 503, 512 (7th Cir. 2009); *United States v. Morris*, 576 F.3d 661, 673 (7th Cir. 2009)). Federal Rule of Criminal Procedure 16(a)(1)(G) does not require an elaborate disclosure of the proffered expert's testimony, particularly in the case of the testimony commonly offered by narcotics agents. *See United States v. Jackson*, 51 F.3d 646, 651 (7th Cir. 1995). Morris does not challenge the government's disclosure here. And that disclosure suggests that Det. Wagner will offer the type of experience-based evidence that has routinely been admitted in this circuit.

Morris has a point with his philosophical objection to law enforcement officers filling the gaps in a drug case with flimsy "expert" evidence. But Morris has not convinced me that

that is what is going on here. Det. Wagner has not been disclosed to offer sketchy testimony about intent, as in *United States v. Moore*, 521 F.3d 681, 685 (7th Cir. 2008). Det. Wagner apparently will testify that the kinds of things found in Morris's apartment, in the quantities found, are typical of a drug-dealing operation. Frankly, I see no way around some experience-based expert testimony of this sort: how is the jury supposed to know whether 60 grams of coke is a frat party or a high-level distribution operation? And I also see no need to explore before trial the methods that Det. Wagner would use to answer such a question, as they will be based on his training and experience, which will establish sufficient reliability to have the testimony admitted. Mostly, Morris's objections go to the weight of Det. Wagner's testimony, and he can try to show that Det. Wagner's testimony should not be believed through cross-examination.

But I have one area of concern: the firearm. Gun ownership and possession is commonplace. At the final pretrial conference I will ask the government to explain why Det. Wagner's testimony that the presence of a single small-caliber handgun in Morris's apartment is an indicator of drug dealing activity is at all reliable. I will rule on the admissibility of this aspect of Wagner's testimony after hearing the government's explanation, although at this point I expect that it will be excluded.

ORDER

IT IS ORDERED that:

1. The magistrate judge's report and recommendation, Dkt. 61, is ADOPTED in part as provided above, and defendant Nathan J. Morris's motion to suppress evidence, Dkt. 26, is DENIED.

2. Defendant Nathan J. Morris's motion for a *Daubert* hearing, Dkt. 54, is DENIED in part and GRANTED in part, as provided above.

Entered September 12, 2016.

BY THE COURT:
/s/

_____
JAMES D. PETERSON
District Judge