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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

02-CR-132-S

GREGORY KAMMERUD,

Defendant.

REPORT

Before the court for report and recommendation is defendant Gregory Kammerud's motion to suppress evidence seized during the execution of a state search warrant. Kammerud contends that there was no probable cause for the warrant and that the officers could not rely on it in good faith. Because this was a late-filed motion and because the facts and law are cut and dried, the parties agreed during a January 24, 2003 telephonic hearing to allow the court to consider the motion with no briefing. Having considered the facts and the law, I am recommending that this court deny the motion to suppress.

Facts

On March 4, 2002, at 11:19 p.m., Jared Cockroft, a drug investigator for the St. Croix Valley Drug Task Force, met in person with Judge James R. Erickson of the Circuit Court

for Polk County, Wisconsin. Investigator Cockroft was seeking a warrant to search two motor vehicles belonging to James Kammerud and currently parked near an apartment at which the police had just arrested another man (Wayne Gurtner) on a warrant. Investigator Cockroft did not prepare a written affidavit in support of his warrant request; instead, he provided sworn oral testimony to Judge Erickson and recorded their conversation with a Dictaphone. Based on Investigator Cockroft's testimony, Judge Erickson issued the requested warrant for Kummerud's vehicles.

The entire transcript is only two pages long. Investigator Cockroft identifies the vehicles to be searched as a blue minivan with Wisconsin license plate 354 CWC and a black Ford van with license plate 195 CKD, both of which were parked in front of 1643 155th Avenue in Balsam Lake Township. This is Investigator Cockroft's statement of his evidence:

> I have received information in the past as to Mr. Kammerud's involvement in the manufacture of methamphetamine. On this date myself and other deputies responded to 1643 155th Avenue for the purpose of arresting Wayne Gurtner on a valid Polk County warrant. In the course of arresting Mr. Gurtner in his downstairs apartment located at 1643 155th Avenue, we observed a blue minivan bearing Wisconsin license 354 CWC that lists to Gregory Kammerud, and once I observed Gregory Kammerud in Mr. Gurtner's apartment.
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> On looking in from the outside while standing in the driveway, I was able to observe the interior of Mr. Kammerud's blue minivan. I observed organic solvents, pseudoephedrine and aluminum foil, all items consistent with the clandestine manufacture of methamphetamine.
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> I also spoke with the owner of the property, Ken Chinander, who advised that a black Ford van parked at the property also belonged to Mr. Kammerud, and when we did a license check, I was advised by dispatch that the plate does belong to Gregory Kammerud. I was able to observe from the

> outside of that vehicle a 20 pound LP cylinder that had had the valve removed and we could observe a bluish-green corrosion on the threads where the valve should have been, consistent with corrosions of anhydrous ammonia. I also observed a blue-green corrosion or residue on the smaller ten pound LP cylinder also located in the back of the black van.
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> In the course of meeting with Ken Chinander, the owner of the property, he did give consent to search his portion of the residence and in doing so he did point out a brown paper sack that he stated belonged to Mr. Kammerud. On standing over the bag and looking down into it, I could observe Red Devil lye, which is also an ingredient in the production of methamphetamine.

Attachment to Motion To Suppress, dkt. 35, at 1-2. The court did not inquire further of Investigator Cockroft before issuing the requested warrant. Agents searched both vehicles and found evidence that Kammerud now wishes to suppress.

Analysis

I. Probable Cause

Kammerud claims that Investigator Cockroft did not establish probable cause to search either of his vehicles. The agent's terse narrative gives Kammerud room to argue, but given the low threshold necessary to establish probable cause, Kammerud loses.

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 could reasonably 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).

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).

Applying this law to the instant facts, I start by discounting Investigator Cockroft's vague statement that "past information" implicated Kammerud in the manufacture of methamphetamine. Absent some indication as to who, what or when, this statement has no measurable worth in the probable cause analysis.

But even if these were Father Flanagan's vans parked at the entrance of Boys Town, Investigator Cockroft would have been justified in concluding that they contained evidence of meth cooking. Preliminarily, there are no questions of presence or staleness, because Cockroft personally saw the materials in the parked vans (and in the apartment) earlier that same day. (Although Investigator Cockroft doesn't say it explicitly, he implies that the parked vans still were parked where the agents first saw them, and that they hadn't moved).

The only question is whether this collection of materials is sufficiently suspicious to establish probable cause that they were being used to cook meth. I conclude that it is.

There are legitimate uses for all of the items listed, and none by itself would support the conclusion that it was being used to make drugs. Investigator Cockroft, however, explicitly stated that these materials were ingredients of methamphetamine or consistent with its manufacture. Indeed, even without this conclusory characterization, it is common knowledge in most courts that meth cookers need and use the ingredients listed. Therefore, when this particular set of ingredients and materials is found together, the instant reaction is "meth lab."

Such common knowledge smooths a glitch in Investigator Cockroft's report: he made much of the two LP tanks that bore indicia of having contained anhydrous ammonia, but he never tied that chemical to cooking meth. He should have done so, but this is not a fatal defect. Anhydrous ammonia has many legitimate uses including as a fertilizer, but its use in methamphetamine production is so well-known that farmers routinely are warned to protect their supply from drug makers. *See, e.g.,* "Preventing Theft of Anhydrous Ammonia" at http://ohioline.osu.edu/aex-fact/0594-1.html. It would have been better for Investigator Cockroft actually to say this, but it is strongly implied in his report to Judge Erickson, and Judge Erickson did not inquire further.

The bottom line is that this was an ugly, conclusory probable cause presentation, but even so, it does not run afoul of the Fourth Amendment. The report was unnecessarily shallow and narrow but it still established probable cause.

II. Officer Good Faith

Even if this court were to find Investigator Cockroft's probable cause report deficient, the good faith doctrine would rescue the search. 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, there is no showing that Investigator Cockroft was dishonest or reckless. His report was accurate, as far as it went. Although he was conclusory and vague in spots, it wasn't because he didn't have the rest of the information. He just gave an extremely terse report. Worth noting is that Agent Cockroft reported in person. If Judge Erickson had had any questions or concerns, Investigator Cockroft was available to answer them before the court decided whether to issue the warrant. Judge Erickson had no questions, so it was reasonable for Investigator Cockroft to assume that his presentation had been sufficient.

Although it would have made a cleaner record for Judge Erickson to have elicited more information, his failure to do so does not make him a rubber stamp. As noted in the probable cause section, anyone who has ever come within spitting distance of a methamphetamine case has learned what it means to gather pseudoephedrine, solvents, lye and anhydrous ammonia. This is hardly arcane knowledge, especially in Northern Wisconsin, a hotbed for meth use and production. So, the lack of questions from the court most fairly is attributable to the court's defensible conclusion that probable cause had been established.

In sum, even if the warrant was not supported by probable cause, the agents relied on it in good faith. There is no basis to suppress the evidence seized.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Gregory Kammerud 's motion to suppress evidence.

Entered this 27th day of January, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge