

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARTIN L. THOMPSON,

Defendant.

REPORT AND
RECOMMENDATION

03-CR-0094-S

REPORT

Defendant Martin L. Thompson has been charged with possession of pseudoephedrine to manufacture into methamphetamine in violation of 21 U.S.C. § 841(c)(2), and possession of equipment, chemicals and materials to manufacture methamphetamine in violation of 21 U.S.C. § 841(a)(1). Before the court is Thompson's motion to suppress evidence seized at his trailer home in Monroe County, Wisconsin pursuant to a state court search warrant. (Dkt. 19.) Thompson challenges the probable cause to support the warrant, arguing that the affidavit contains only stale information, does not make clear that the informant is an arrested snitch, and that the police illegally corroborated the informant's story by searching within the curtilage of Thompson's home. As discussed below, there was probable cause to support the warrant as written. Police corroborated any stale information by gathering fresh evidence the day before the warrant was issued, the warrant is not misleading as to the informant, and Thompson had no legitimate expectation of privacy in the areas where police observed corroborating evidence. Accordingly, I am recommending that Thompson's motion be denied.

FACTS

The warrant and affidavit, which are attached to Thompson's motion, speak for themselves. The affiant is Special Agent Kenneth Peters of the Wisconsin Department of Justice, Criminal Division, Narcotics Bureau. The affidavit states that Kevin Miller, in an interview with a police investigator during the week of February 23, 2003, revealed that he taught Thompson how to cook methamphetamine, and that Miller and Thompson would make one ounce quantities of methamphetamine twice per week at Thompson's residence. Miller and Thompson would steal propane tanks from forklifts in the Monroe County area, and fill the tanks with anhydrous ammonia, an ingredient necessary to make methamphetamine. Agent Peters explains that Kevin Miller is married to Lisa Miller, and a domestic violence intervention program coordinator saw a white lumpy substance and split batteries in the Miller household, both indicative of methamphetamine use, and that a subsequent consent search of the Miller household revealed numerous used hypodermic needles.

Miller described Thompson's residence as a blue and white trailer house with a wooden porch and flat roof located at 26023 Magnum Road in the town of Portland, Wisconsin. On April 29, 2003, Agent Peters and Investigator Jeffrey Sullivan of the Monroe County Police entered the land at 26023 Magnum Road with the permission of Thompson's landlord. Peters observed at least fourteen aerosol cans in a burn pile, numerous rectangular aluminum containers, two large pump-style squirt guns and, through the window of a bus parked near the residence, a propane tank consistent with the size and style used for

forklifts. These items, while as Thompson's reply brief points out "common at the most banal of church picnics," are, according to Agent Peters' specialized knowledge and training, commonly used in the manufacture of methamphetamine.

Agent Peters submitted this affidavit and a draft search warrant to Monroe County Circuit Court Judge Michael J. McAlpine, who issued the warrant on May 5, 2003. On the same day, Agent Peters relied on it to search Thompson's residence and seize the contraband being used against Thompson in this prosecution.

ANALYSIS¹

Legal Standard

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) (citing *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

¹ The government sua sponte granted itself a two-day extension to file its response. Arrogating the court's scheduling prerogatives is not endearing. If this happens again without leave of court, the government's response is a nullity.

interpreting the affidavits in a hypertechnical rather than a common sense manner. *Walker*, 237 F.3d at 850.

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) (citing *United States v. Spry*, 190 F.3d 829, 835 (7th Cir. 1999)).

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) (citations omitted). 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 in establishing 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 862, 866 (7th cir. 2002). 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).

Probable Cause

Thompson argues that Agent Peter’s affidavit lacks probable cause because the information in the affidavit is stale. It is true that the affidavit does not state when Miller taught Thompson to make methamphetamine, nor when they made it. But even if this were

ancient history, Peters and Sullivan corroborated Miller's story when they visited Thompson's residence and saw evidence of methamphetamine manufacture. It is well-established that stale information is not fatal where the government's affidavit updates, substantiates, or corroborates the stale material. *United States v. Butler*, 102 F.3d 1191, 1198 (11th Cir. 1997). The affidavit, read as a whole in a realistic and common sense manner, alleges specific facts and circumstances from which the issuing court reasonably could conclude that the items used in the crime of methamphetamine manufacture could be seized at Thompson's residence.

Miller told police that Thompson manufactured methamphetamine at his residence. Miller was presenting personal knowledge, as he taught Thompson how to cook methamphetamine and made it with Thompson on a regular basis. Miller also stated that he and Thompson stole propane tanks from forklifts to use in the manufacture of methamphetamine.

Police went to Thompson's residence to see if the information could be corroborated. It was. Police observed various clues suggesting that methamphetamine was manufactured at Thompson's residence, including aluminum containers, aerosol cans and squirt guns. Significantly, police observed a propane tank, like those used to power forklifts, in a bus parked on Thompson's property. This evidence corroborated Miller's detailed, firsthand information regarding methamphetamine manufacture at Thompson's residence. This is substantial basis for determining the existence of probable cause.

Franks Analysis

Thompson, citing *Franks v. Delaware*, argues that the affidavit contains false statements made knowingly and intentionally or with reckless disregard for the truth or omits facts which, if included, would preclude a finding of probable cause. 438 U.S. 154 (1978). To be entitled to a *Franks* hearing, a defendant must point to the specific problems with the affidavit that support his allegations of falsehood or reckless disregard for the truth. *Id.* at 171. Here, Thompson argues that Agent Peters should have spelled out Miller's status as a convicted criminal who sought to curry favor with police while under arrest, that Miller had used methamphetamine within twenty-four hours of speaking to police, and was upset with Thompson because Thompson had been spending time with Miller's wife and providing her with methamphetamine.

Thompson did not ask for a *Franks* hearing in his initial brief because he had a hearing on a motion to suppress in Wisconsin state court. But in his reply Thompson explicitly requests such a hearing, but does not show that another hearing would adduce any additional evidence not present before the court. Monroe County Circuit Court Judge Michael J. Rosborough heard Thompson's arguments, let him develop a full record, and ruled from the bench that the search warrant was valid.² The hearing revealed that the informant,

² If Thompson were attempting to appeal this ruling by appearing in federal court with a federal claim, this court would be precluded under the *Rooker-Feldman* doctrine from reaching the merits of Thompson's claim. See, *Roberts v. Los Angeles City Fire Dep't*, 32 Fed Appx 267, 269 (9th Cir. 2002) (federal district court lacks jurisdiction where ruling in favor of plaintiff would require overturning state court *Franks* decision). But Thompson is before this court as a defendant charged with a federal crime, thus he is not attempting to vindicate federal rights that were inextricably intertwined with any state court proceedings. See, *Dist of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n. 16 (1983).

Kevin Miller, was under arrest when he gave information to police and had a prior criminal record. Kevin Miller and his wife Lisa both had been arrested for a domestic disturbance, and Kevin sought to avoid a charge of disorderly conduct for Lisa by offering information on methamphetamine manufacture in Monroe County.

While Agent Peters does not spell out in his affidavit that Miller is a police informer, he does not present him as a heroic citizen witness either. The affidavit states that Miller told Investigator Sullivan, in an interview, that he: (1) taught Thompson how to cook methamphetamine; (2) made methamphetamine with Thompson twice per week; and (3) stole propane tanks from forklifts with Thompson to use in the manufacture of methamphetamine. Peter's affidavit makes clear that Miller is a manufacturer of methamphetamine, and that Miller was being interviewed by police when he made these statements regarding Thompson.

As Judge Rosborough noted, Miller had nothing to gain and a lot to lose by sending the police on a wild-goose chase for methamphetamine at Thompson's residence. Miller, "in an attempt to strike a bargain with the police, had a strong incentive to provide accurate and specific information rather than false information about [Thompson's] illegal activity." *United States v. Koerth*, 312 F.3d 862, 870 (7th Cir. 2002) (citations omitted). If Miller wasn't looking for a deal, then his confession that he committed burglaries to help him in the manufacture of methamphetamine could be viewed as simply compounding his problems. The shoot-himself-in-the-foot nature of his confession enhances its reliability.

See, United States v. Leidner, 99 F.3d 1423, 1430 (7th Cir. 1996) (informant's credibility increases when he admits engaging in prior criminal acts with the suspect).

But even if the affidavit included everything that Thompson suggests, it would still establish probable cause. *See, United States v. Whitley*, 249 F.3d 614, 624 (7th Cir. 2001)(court should not quash warrant if probable cause still exists after purging false information) Thompson's version of Peter's affidavit would show the following:

- 1) Ten weeks ago, Miller stated to police that he taught Thompson how to make methamphetamine.
- 2) Miller stated that he and Thompson would make one-ounce quantities of methamphetamine at Thompson's residence approximately twice per week, and that they would steal propane tanks from forklifts in the area to use in the manufacture of methamphetamine.
- 3) Miller and his wife, Lisa, were users of methamphetamine who were both under arrest for a domestic disturbance when Miller revealed to police the information on Thompson.
- 4) Miller specifically sought for the charges against Lisa to be dropped in exchange for his information on Thompson.
- 5) Miller had used methamphetamine within twenty-four hours of speaking to police.
- 6) Miller heartily dislikes Thompson.
- 7) Miller has a criminal record.
- 8) Last week, I (Agent Peters) went with Investigator Sullivan to Thompson's residence and saw, in plain view, burned aerosol cans, rectangular aluminum containers, squirt guns, and a propane tank similar in shape to those used on forklifts.
- 9) According to my specialized knowledge and training, these items are commonly used in the manufacture of methamphetamine.

Thompson's additional details would not impact the finding of probable cause. *Molina ex rel Molina v. Cooper*, 325 F.3d 963, 968-70 (7th Cir. 2003)(citation omitted). Just because Miller is a crook with an agenda of his own does not mean that the whole affidavit stinks. Probable cause exists because Peters and Sullivan sufficiently corroborated Miller's story by visiting Thompson's residence and observing evidence of methamphetamine manufacture in plain view.

Warrantless Search

Thompson final argument is that the propane tank and other items noted by Agent Peters and Officer Sullivan when they visited site prior to the issuance of the warrant were seen illegally within the curtilage of Thompson's residence, and therefore may not be used in the probable cause determination. The government entirely fails to address the legality of the pre-warrant visit to Thompson's residence, and Thompson's reply brief fails to elucidate his curtilage argument. Thus this court is left to apply law to facts without the benefit of adversarial argument.

The touchstone of Fourth Amendment protection is reasonableness, *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), and the protections of the Fourth Amendment extend to wherever a citizen has a legitimate expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citations omitted). Curtilage is the area surrounding a home so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection. *United States v. Dunn*, 480 U.S. 294, 301 (1987). Whether an area is within a

house's curtilage depends not only on the proximity to the house but also on the use of the area and efforts to shield it from public view and access as well as the nature for which it is used. *U.S. v. French*, 291 F.3d 945 (7th Cir. 2002).

When Agent Peters and Investigator Sullivan went to Thompson's residence on April 29, 2003, they first received permission from the landowner, Robert Everson, to be present on any land owned by Everson. This does not get the search of the area around Thompson's residence over the Fourth Amendment hurdle, because a legitimate expectation of privacy is not tied to property ownership but to a legitimate expectation of privacy. *Rakas*, 439 U.S. at 143.

The property that Thompson rented from Everson was not bordered by any fence, gate, hedge, or other boundary. There were no "no trespassing" signs on the property. Peters and Sullivan entered the property with Everson's permission and walked through the yard, observing the aerosol cans, aluminum containers, squirt guns, and propane tank in plain view. Although Thompson easily could have secreted these items from public view, he failed to do so. By exposing these items in the yard next to his rented home, a place where he should have anticipated the legal presence of other persons, Thompson failed to exhibit a subjective expectation that the items were private. *United States v. Fields*, 113 F.3d 313, 322 (2nd Cir. 1997).

Thompson's argument regarding the burn pile hinges on the idea that it is not visible from the driveway. However the driveway is not the only lawful vantage point from which police may make observations without a search warrant. *See e.g., Florida v. Riley*, 488 U.S.

445, 451 (1989) (surveillance of greenhouse from helicopter 400 feet above valid without warrant). Here, Thompson had no legitimate expectation that the open field behind his rented residence was private. Also, the burn pile is not within the curtilage of Thompson's residence. It would be a colorable argument to suggest that an object *between* the burn and Thompson's residence is within the curtilage. Instead, Thompson wants the Fourth Amendment to extend *beyond* the only discernable barrier surrounding his residence. The Fourth Amendment has no such reach. *United States v. Knotts*, 460 U.S. 276, 282 (1983) (no expectation of privacy extended to movements of objects outside the cabin in open fields).

With regard to the propane tank, Thompson has no legitimate expectation of privacy for an item in plain view through the window of a bus parked in his driveway. Thompson makes no showing that the bus windows were obscured, that the propane tank was obscured, or any other showing that he had a legitimate expectation that the interior of the bus was private. Police, from the lawful vantage point of the driveway, were able to see through the unobstructed bus window a propane tank that matched the type used on forklifts.

Having demonstrated no legitimate expectation of privacy for the burn pile behind his residence or through the unobstructed window of a bus parked near his residence, Thompson's claim that police illegally viewed the corroborating evidence fails.

In summary, the warrant to search Thompson's mobile home in Monroe County was supported by probable cause. Agent Peters affidavit presents both Miller's detailed firsthand information and police corroboration suggesting that Thompson manufactured

methamphetamine at his residence, the affidavit is not misleading as to Miller, and Peters and Sullivan did not illegally search the curtilage of Thompson's residence to gather corroborating information.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Martin L. Thompson's motion to suppress in all respects.

Entered this 31st day of October, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge