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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

04-CR-064-S

STEVE A. BETRO,

Defendant.

REPORT

This is a drug and gun case in which defendant Steve Betro has been charged with possessing methamphetamine, drug paraphernalia and firearms after having been convicted of a felony. The evidence against Betro was discovered during a search of his residence pursuant to a state-issued warrant. Before the court for Report and Recommendation is Betro's motion to quash the warrant and suppress evidence. *See* dkt. 16. Betro contends that the warrant lacks probable cause. He's right, but the good faith doctrine saves the warrant and prevents suppression. I am recommending that this court deny Betro's motion.

A copy of the challenged search warrant affidavit is attached to a different motion docketed as 12, and the affidavit speaks for itself. Here is a brief synopsis:

On February 27, 2004, Portage County Sheriff's Department Investigator Nick Griesbach applied to the Circuit Court for Portage County for a warrant to search Betro's residence at 7563 Lake Thomas Road in the Town of Stockton. The items sought by the

warrant were methamphetamine, manufacturing and packaging paraphernalia and ingredients, drug records and other documents, cash, weapons, and indicia of residence. In support of this warrant request, Investigator Griesbach reported the following:

Investigator Griesbach had spent six years with the Portage County Sheriff's Department, the last three investigating drug crimes. Based on his training and experience, Investigator Griesbach knew how people manufactured methamphetamine, including the ingredients, equipment, and other items needed, the method by which the manufacturing occurred, and the nature of the resulting product.

With regard to the instant investigation, Investigator Griesbach reported that on July 10, 2001, he and other state law enforcement officers executed a warrant at Betro's residence during which they found and seized 26 live marijuana plants, 127 grams of marijuana, 7.5 grams of methamphetamine, and items used to manufacture methamphetamine. Following his arrest, Betro told the agents that he had been using methamphetamine since he was 14 years old and had been cooking methamphetamine for quite some time. Betro subsequently entered a plea agreement with the state and pled guilty to two drug charges on July 24, 2002.

In June 2003, state parole agents contacted the sheriff's department to report that Betro recently had tested positive for methamphetamine use. As a result, the probation agents conducted a search of Betro's residence on June 16, 2003. They found a tin can containing a paper bindle with suspected methamphetamine residue, a hypodermic needle, a metal spoon with suspected residue and a small glass vial containing a substance that tested

positive for the presence of methamphetamine. The authorities subsequently charged and convicted Betro of possession of methamphetamine.

Skipping ahead to February 25, 2004, Investigator Griesbach spoke with an anonymous informant (CW) who wished to provide information. CW told Investigator Griesbach that a man named Kenny Groholski had told CW that Groholski had been buying methamphetamine from Betro, and that Betro cooked methamphetamine at his residence. CW reported to Griesbach that CW had observed Groholski in possession of methamphetamine on numerous occasions in the past, and that Groholski had told CW that Betro was the source. CW reported that within the last week, Groholski had told CW that he had been to Betro's residence and bought methamphetamine from Betro. Groholski also told CW that Betro was cooking methamphetamine in an old vehicle on the property while Groholski was there.

CW described Betro's residence to Investigator Griesbach, stating that it was a large farm-style house with an old barn, surrounded by numerous old cars, and having blue Christmas lights on the house. Investigator Griesbach knew from personal observation that this was an accurate observation. County records confirmed that this residence at 7563 Lake Thomas Road was owned by Steve Betro.

Investigator Griesbach further reported that he did not know CW, and that CW did not ask Griesbach for any financial or judicial consideration, and was not offered any. CW provided Investigator Griesbach with additional information that Investigator Griesbach was

able to corroborate independently, which indicated that CW was truthful and reliable. Specifically, CW told Investigator Griesbach that Groholski was hiding from the law and that Groholski frequently stayed at his grandfather's house in the Custer area. Investigator Griesbach knew that the Stevens Point Police Department currently held an active arrest warrant for Groholski and that Groholski's grandfather lived at 8083 Sixth Street in Custer, Wisconsin. Finally, CW identified another person as a meth dealer, which matched up with Investigator Griesbach's independent information.

The state court issued the requested warrant, and sheriff's deputies seized the items that form the basis of the federal criminal charges against Betro.

Analysis

A. The *Franks* Challenge

Pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), Betro had hoped to bolster his motion to suppress by identifying "CW" and establishing that he was not trustworthy. Betro also hoped to be able to show that Investigator Griesbach knew or should have known that he could not trust CW, and that his averments in his search warrant affidavit intentionally or recklessly misstated or omitted material facts provided by CW. Such a showing would force redaction of the challenged affidavit and possible suppression of evidence.

Betro's problem is that he has no means by which to develop this evidence except at an evidentiary hearing, but he cannot obtain such a hearing without first making a

substantial showing that his claims are valid. *See United States v. Marrow*, 272 F.3d 817, 821 (7th Cir. 2001).

Additionally, any alleged material misstatement in or omission from the challenged affidavit must be that of a government agent; absent proof of agency, confidential informants are not "agents." *United States v. Roth*, 201 F.3d 888, 892 (7th Cir. 2000). Thus, the question whether an informant made false statements to an officer seeking a search warrant is irrelevant unless the defendant can show that the agent included these false statements in his affidavit knowing they were false or with reckless disregard for whether they were true. *See id.*

Confronted with *Franks'* chicken-egg paradox, Betro was unable to show that CW had lied to Investigator Griesbach, let alone that the investigator knew this. In light of this, Betro's only remaining viable challenge to the warrant is lack of probable cause.

B. Probable Cause in General

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 at 893, *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).

Toward that end, hearsay within hearsay is acceptable in a warrant affidavit so long as reliability is established. *United States v. Carmichael*, 489 F.2d 983, 986 (7th Cir. 1973)(en banc). For instance, statements against interest by the "second" informant can establish his reliability. *Id.*

A suspect's previous conviction of similar crimes or other "propensity" evidence tends to support a warrant to search for new evidence of such crimes. *See United States v. Angle*, 234 F.3d 326, 334 (7th Cir. 2000)(two prior convictions of sex crimes with minors helped establish probable cause to search for child pornography); *United States v. Foree*, 43 F.3d 1572, 1576 n.5 (11th Cir. 1995)(suspect's previous guilty plea to growing marijuana on same property corroborates the probable cause finding). In drug investigations, courts issuing

search warrants are entitled to infer in a drug case that evidence likely will be found where the drug dealer lives. *See United States v. Koerth*, 312 F.3d 862, 870 (7th Cir. 2002); *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999).

A person's admission of personal involvement in criminal activity is presumed reliable. *See, e.g.,* F.R.Ev. 804(b)(3); *United States v. Harris*, 403 U.S. 573, 583-84 (1971); *United States v. Brown*, 366 F.3d 456, 459-60 (7th Cir. 2004) (self inculpatory statements are weighty factors in establishing probable cause to arrest an alleged accomplice); *United States v. Johnson*, 289 F.3d 1034, 1039-40 (7th Cir. 2002) (collecting recent cases).

C. Informants and Probable Cause

When police use informants 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). In most cases, the affiant has not appeared before the court, so 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).

If a search warrant affiant characterizes an informant as "reliable," he must support this claim with facts or the court will deem that informant "of unknown reliability." *Id.*; *see also United States v. Koerth*, 312 F.3d 862, 867 (7th Cir. 2002). But even statements from an informant of unknown reliability might establish probable cause if, under the totality of circumstances, a reasonable person might consider the statements worthy of credence. *Koerth*, 312 F.3d at 867-68. If an informant is shown to be right about some things, then he probable is right about other facts he has alleged. *United States v. Huebner*, 356 F.3d 807, 816 (7th Cir. 2004). For instance, a highly detailed tip that is extensively corroborated establishes an informant's credibility. *Id.*

Informants play a valuable role in helping the police root out crime, but their value depends on the police and the courts ensuring the integrity of the system by closely scrutinizing them and their claims. *United States v. Bernal-Obeso*, 989 F.2d 331, 334-35 (9th Cir. 1993); *see also United States v. Leidner*, 99 F.3d 1423, 1430 (7th Cir. 1996)("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. at 234).

D. Betro's Challenges

With this gloss of probable cause and informant law as the backdrop, Betro claims that the warrant for his residence was insufficient because CW had no first hand information, the statements he provided lacked detail, there was inadequate corroboration of CW's information, the time interval between when the CW reported his information and when Investigator Griesbach sought the warrant is "suspect," Finally, Betro exhorts this court not to water down the probable cause requirement to rescue yet another weak state-generated search warrant. *See* dkt. 16.

Starting with CW's reliability, I agree with the government that CW provided a sufficient quantity of detailed information to be deemed reliable. In addition to knowing facts that appear to be inside information but really are readily observable to the public (for instance, knowing that Betro had festooned his house with blue Christmas lights), CW revealed information about Kenny Groholski avoidance of the Stevens Point police, as well as another unnamed meth dealer, that bespoke a genuine insider's perspective. So, there was no doubt that CW knew and talked to Kenny Groholski about confidential matters. Additionally, there is no indication that CW was snitching out Groholski and Betro for reasons that would undermine CW's credibility. Apparently CW was not working off a beef, although this is not entirely clear from the way Investigator Griesbach wrote his affidavit. In any even CW neither sought nor obtained consideration for the information he provided. It would be naive to characterize CW as nothing more than a public-spirited citizen intent

on doing the right thing, but the record provides no hint of an agenda that would cast doubt on CW's motives or trustworthiness.

Which takes us to Groholski, who is something of an "unwitting informant" if one were to attribute any credibility to CW. Groholski's unguarded statements against interest involving his drug purchases from Betro are the sort one would not make unless they were true.

Does the Fourth Amendment allow police to search a suspect's home when an unnamed, untested informant claims that he heard from someone else that that other person regularly bought drugs from the suspect? No. This simply is not enough information to equal probable cause. What if we add to the mix that the suspect is a known drug user with two prior drug convictions within the past two years? This adds depth and context; notwithstanding F.R.Ev. 404(b)'s rule for trials, common sense and logic support the inferential chain that because Betro did it before (a lot), he's probably doing it again, just like CW claims that Groholski says he is. This still isn't enough. Even though the probable cause threshold is low, an untested, unidentified informant's second-hand report about a known drug trafficker does not clear the bar.

Other Seventh Circuit cases provide context: in *United States v. Peck*, 317 F.3d 754 (7th Cir. 2003), the court found that there was no probable cause to support a state warrant issued solely on the sworn but uncorroborated testimony of a confidential informant who claimed that within the past two days, Peck had shown her large amounts of substances he

claimed to be crack and marijuana that he intended to sell, and which the CI recognized as crack and marijuana from her personal experience. The court found that there was no probable cause because the CI had failed to provide specific details such as where the drugs were hidden, the total amount possessed, the frequency with which Peck sold the drugs, how the CI knew that these really were drugs, and because she had not made statements against her own interest (for instance by admitting that she knew what crack looked like because she used to sell it). *Id*. at 756. The court also was troubled because even though the CI claimed to be the defendant's girlfriend, she could not describe him physically, except that he was a "black male." *Id.* Finally, the police failed to corroborate these statements in any fashion except to run a criminal record check showing a prior drug arrest. *Id.* at 757. Even so, the court upheld the warrant pursuant to the *Leon* good faith doctrine, finding that although the warrant was bare bones, it was not so lacking as to make it facially deficient. *Id.*

In *United States v. Reddrick*, 90 F.3d, 1276 (7th Cir. 1996) the court was troubled by the sparse evidence provided by the informant. There, the informant provided a first hand account of seeing drugs at the house to be searched, but provided little detail except for the quantity. There was no corroboration of the informant's information and the informant had not appeared for a demeanor check before the issuing judge. The court concluded that "in these circumstances, the information from the informant alone could not have supported the issuance of a search warrant." *Id.* at 1280-81. What saved the warrant was that the

informant had made three additional buys of illegal drugs from the defendant. This was enough to put the warrant over the top. *Id.*

In *United States v. Jones*, 208 F.3d 603 (7th Cir. 2000), an informant told a police officer that she had gone to defendant's house to purchase marijuana the day before. She claimed to have bought a total of 12 pounds from defendant on three previous occasions; this time, she claimed to have paid $1100 to square up a "front" and to have received a new pound of marijuana on a front. The informant told the police that she had seen another pound of marijuana on the defendant's kitchen table and that the defendant told her he kept a gun in the house to protect his drugs. The defendant also claimed to have been in jail in the past. The police corroborated this information by driving by the house with the informant, then checking the license plates of cars parked there, one of which turned out to be registered to the defendant. The police also ran a records check on the defendant and found that he had 27 arrests with 8 convictions, five for dangerous drugs, two for armed robbery. The officers presented this information to the court in an affidavit *and* presented the informant to the court to swear to her affidavit in person. *Id.* at 606. The court upheld the search warrant against the defendant's probable cause challenge because the informant had provided detailed first hand information and had made statements against her penal interest, the informant had appeared personally before the court for a credibility review, and the police had corroborated as much of the informant's information as they could. The court decided that "all of this, taken together, establishes the requisite indicia of reliability." *Id.* at 609.

None of these cases contains so few facts in support of probable cause as this one. The police response to CW's tips was the right idea but poorly executed. There were other investigative techniques available that perhaps would have eked more information out of Groholski, but they were not used, and it is not even clear that this would have generated better, more direct information about Betro. In short, the search warrant was not supported by probable cause.

That, however, is only the first half of the analysis.

E. The Good Faith Doctrine

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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> * * *
>
> 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.

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.

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 evidence the state judge abandoned his neutral role, or that the sheriff's deputies were reckless in their investigation, and Investigator Griesbach reported

sufficient facts that it was reasonable for him to presume that the warrant issued by the court was valid.

In *United States v.Langford*, 314 F.3d 892 (7th Cir. 2002), the court found that probable cause did not support a search warrant issued on the basis of tips from two unidentified informants and an "insolubly ambiguous" list purported to be a drug ledger. Even so, the court concluded that

> Thin as the basis of the warrant to search for evidence of drug dealing was, it was not so thin as to defeat the rule that evidence obtained in a search is not to be excluded at trial if the search was pursuant to a warrant issued by an authorized judicial officer, provided that in executing the warrant the police were not acting in bad faith.
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> *Id*. at 894.

So it is here. The sheriff's department provided its information to the court in good faith and obtained a warrant. The deputies cannot be faulted for relying on that warrant. This court should not 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 Steve Betro's motion to quash the search warrant for his residence.

Entered this 16th day of July, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge