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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD LEE SIDWELL,

Defendant.

REPORT AND RECOMMENDATION

04-CR-169-S

REPORT

Before the court for report and recommendation are defendant Gerald Sidwell's motion to dismiss the indictment (dkt. 22) and motion to quash the search warrant for his apartment (dkt. 23). For the reasons stated below, I am recommending that this court deny both motions.

I. Motion to Dismiss

The grand jury has charged Sidwell with being a felon in possession of a gun that previously had traveled in interstate commerce, in violation of 18 U.S.C. § 922(g)(1). To preserve his record, Sidwell has moved to dismiss the indictment on the ground that § 922(g)(1) exceeds Congress's powers under the Commerce Clause of the Constitution. As Sidwell acknowledges, the Court of Appeals for the Seventh Circuit consistently has ruled that such challenges are meritless. *See, e.g., United States v. Keller*, 376 F.3d 713, 716-17 (2004). Accordingly, I am recommending that the court deny this motion.

II. Motion to Suppress

The shotgun charged against Sidwell in this case was found during the July 2, 2004 execution of a state search warrant for Sidwell's apartment during which the Beloit Police actually were looking for drugs. Sidwell contends that the warrant was not supported by probable cause and that it cannot be rescued by the "good faith" doctrine of *United States v. Leon,* 468 U.S. 926 (1984). The government disagrees on both points. Whether there is probable cause might be viewed as a close call, but the very fact that this is debatable brings the warrant under the aegis of the good faith doctrine. Therefore, this court should deny Sidwell's motion to suppress.

A. The Search Warrant

The search warrant affidavit speaks for itself and may be found attached to Sidwell's motion to suppress (dkt. 23) and the government's brief in opposition (dkt. 31). As an overview, on July 2, 2004, Drug/Gang Investigator Bryan Hasse of the Beloit Police Department (BPD) swore out an affidavit seeking to search Sidwell's residence, Apartment 25 at the College Inn Apartments, 614 Broad Street in Beloit. The apartment building had a common entrance, internal hallways, at least two floors and at least 25 apartments. Sidwell's apartment was on the second floor at the far end of the hallway. In support of his warrant request, Investigator Hasse averred that:

1) BPD's Special Operations Bureau "ha[d] received two pieces of intelligence indicating that cocaine is being sold and used at 614 Broad St., Apt #25." Investigator Hasse did not include the date, source or content of these tips.

2) Investigator Hasse on two unspecified dates visited Apt. 25 in response to "drug complaints" and spoke with Sidwell. Sidwell refused to allow Investigator Hasse to search his apartment without a warrant.

3) On unspecified dates (presumably the dates that Investigator Hasse visited Sidwell) drug paraphernalia consisting of "baggie corners and knots" were located in the hallway around the entrance of Apt. 25.

4) Less than 72 hours prior to Investigator Hasse's affidavit, a police informant, CI 370, made a controlled buy of crack cocaine from Apt. 25. First, Hasse ensured that CI 370 was not taking drugs or extra money into the apartment building with him. Hasse watched CI 370 as he entered the apartment building and when he exited a few minutes later. CI 370 surrendered crack cocaine that he reported he had bought from a white male at Apt. 25. He provided a description of the interior of the apartment that corresponded with Investigator Hasse's observations when he had visited the apartment.

5) Investigator Hasse believed CI 370 to be reliable because he had completed "numerous" controlled buys under the direction of the Drug and Gang Unit and provided other information that DGU had verified to be "accurate and true" and had provided information that had led to other search warrants and to drug arrests.

The Circuit Court for Rock County issued the requested warrant and the DGU executed it that same day. The police recovered 0.1 gram of marijuana, rolling papers, two "finger scales", 17 morphine pills, "indicia," a Mossberg 20 gauge shotgun, three 20 gauge shells, and two .357 magnum rounds.

B. Probable Cause

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 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).

In this case, Sidwell separately challenges the weight and relevance of each salient fact offered in the search warrant affidavit, then argues that even considered collectively, these facts do not establish probable cause. Sidwell makes some valid points along the way, but ultimately, the controlled buy puts the warrant application over the top.

First, I agree with Sidwell that it is merely white noise to report that BPD had two "pieces of intelligence" that in some manner "indicated" that cocaine was being sold and used at Sidwell's apartment. Given the complete absence of specifics, this announcement had no evidentiary value. Equally useless were the amorphous "drug complaints" about Apt. #25 and Sidwell's exercise of his constitutional right not to consent to a police search without a warrant.

Of more value is the presence outside Sidwell's apartment of baggie corners and knots, both indicia of drug sales and use. Sidwell argues that this litter could have been associated with another apartment. This is true, but the baggies gain significance from the controlled buy that followed less that less than 72 hours before Investigator Hasse submitted his affidavit.

The controlled buy obviously is the lynchpin to this warrant because when a CI actually purchases drugs from an investigative target, courts usually find probable cause. *See, e.g., United States v. Brack*, 188 F.3d 748, 755-56 (7th Cir. 1999); *United States v. Taylor*, 154 F.3d 675, 679 (7th Cir. 1998); *United States v. McKinney*, 143 F.3d 325, 329 (7th Cir. 1998).

Not so fast, counters Sidwell: He challenges the validity of this exercise, claiming that because the police did not monitor CI 370 from the time he entered the building until the time he re-appeared with the drugs, it is unreasonable to attribute to Sidwell the drugs subsequently produced by the CI. Although the buy could have been more tightly controlled, the failure to do so does not invalidate the results. It's not surprising that the police did not follow CI 370 into the building because surveillance could have alerted the drug sellers that something was up. A body wire would have tightened things up considerably but the failure to use one won't disqualify the government from establishing probable cause. *See United States v. McKinney*, 143 F.3d at 329. Here, the police ensured that their informant was not taking drugs or extra money into the apartment building with him and they watched him enter and watched him leave a few minutes later. CI 370 then produced the crack cocaine reportedly bought at Apt. 25, the interior of which he described accurately.

Sidwell protests that this is not enough, but Occam's Razor suggests otherwise: although a complicated subterfuge by the informant was not physically impossible, it is more logical and reasonable to conclude that the informant actually obtained the drugs from

Sidwell's apartment, which he accurately described and outside of which police had seen drug packaging materials, than to suppose that the informant employed another source of drugs inside the building to frame Sidwell. Keep in mind that the police were able to vouch for CI 370's reliability as a snitch and a field operative. So, to the extent that the four-part test of informant reliability might apply here, *see United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001), we have a veteran informant claiming to have engaged in a hand-to-hand drug buy from the targeted apartment, supported by an accurate description of the apartment and corroborated by the drugs he claimed to have bought. Sidwell can argue 'til he's blue in the face about the potential for bootstrapping inherent in such an analysis, but it's enough under the law of this circuit to establish probable cause. *See, e.g., McKinney*, 143 F.3d at 329.

So, this court could uphold the warrant as validly issued. But suppose this court were to give Sidwell the benefit of the doubt and question whether one drug purchase by a veteran informant, unobserved during the actual sale, establishes probable cause. Sidwell still loses because this scenario is well within the zone of forgiveness demarcated by the good faith doctrine.

C. 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.

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.

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).

So it is in this case. There is no indication that the issuing judge was biased. The affidavit was not bare-boned. There is no hint that the police were dishonest or reckless; at worst, they didn't investigate as thoroughly as Sidwell, the unwilling object of their attention, wished they had. Therefore, even if the facts adduced in Investigator Hasse's affidavit did not establish probable clause, they were sufficiently close that it was objectively reasonable for the officers to believe that their warrant was valid. Having received the court's imprimatur, they had done all they reasonably could do. Therefore, suppression is not appropriate.

RECOMMENDATION

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

Entered this 3rd day of February, 2005.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge