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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK HURN,

Defendant.

REPORT AND RECOMMENDATION

05-CR-85-S

REPORT

The grand jury has charged defendant Mark Hurn with possessing crack and powder cocaine with intent to distribute. The evidence against Hurn was recovered June 3, 2005 at about 5:00 a.m. when Madison police executed a state search warrant at Hurn's residence. Hurn has moved to suppress this evidence because the search warrant was not supported by probable cause (dkt. 39) and because police entered his home before 6:00 a.m. without specifically requesting a nighttime warrant from the state court (dkt 37). Also pending is Hurn's motion to reveal the informant's identity (dkt. 28). For the reasons stated below, I am recommending that the court deny all of these motions.

I. The Search Warrant

Hurn requested a *Franks* hearing but acknowledged that he could not establish that the allegedly prevaricating informant was an "agent" of the police; also, the government confirmed that the Detective Dawn Johnson submitted only one affidavit to the issuing

court, not two. Accordingly, what's left for the probable cause review is Detective Johnson's unedited affidavit, a copy of which is attached to the Affidavit of Sabrina Mays (dkt. 42).

A. The Warrant

Detective Johnson's affidavit speaks for itself, but I will synopsize its key points. On June 2, 2005, Detective Johnson presented to the Dane County Circuit Court a request for a warrant to search Hurn's residence at 2 Bahr Circle in Madison, which he shared with Sabrina Mays. In part one of her affidavit, Detective Johnson outlined a series of trash picks she undertook at Hurn's apartment.

On May 10, 2005, Detective Johnson searched four bags of trash. One contained four sandwich baggies with corners removed, but lacked any documents that would tie the trash to Hurn. Detective Johnson averred that baggie corners commonly are used to package drugs for resale.

On May 17, 2005, Detective Johnson searched five bags of trash. One bag held a sandwich baggie "with possible trace evidence." Bag No. 2 contained mail addressed to Sabrina Mays at the residence, one sandwich baggie containing 0.5 grams of cocaine powder, three whole sandwich baggies, three knotted sandwich baggies, two corners from sandwich baggies and eight sandwich baggies with significant portions of their corners removed. Bag No. 4 contained receipts to the Hurns, one sandwich baggie and thirteen sandwich baggies with significant portions of their corners removed.

On May 24, 2005, Detective Johnson searched six bags of trash. Bag No. 1 contained a telephone bill to Mays, Bag No. 2 contained three sandwich bags with the corners removed, Bag No. 4 contained myriad documents associated with Mays, Bag No. 5 contained seven sandwich baggies with "significant portions of the corners removed," and one sandwich baggie with white residue that tested positive for the presence of cocaine. Bag No. 6 contained an electric bill to Mays at Bahr Circle, two sandwich baggies with significant portions of the corners removed, and a cellophane "pocket" with additional cellophane wrapping.

On May 31, 2005, Detective Johnson searched five bags of trash. Bag No. 1 contained two sandwich baggies with significant portions of their corners removed. Bag No. 3 contained a form addressed to "Sabrina Hayes," ten sandwich baggies with significant portions of the corners removed, and one sandwich baggie with white residue that tested positive for cocaine. Bag No. 5 contained several documents addressed to Sabrina Mays and six sandwich baggies with significant portions of their corners removed.

In part two of her affidavit, Detective Johnson reports that she spoke with her informant (CI 862) in October 2004 and on June 1, 2005. Detective Johnson does not differentiate which of the salient information she learned in 2004 and which she learned on June 1. The CI also reported, among other things, that "Mark Hurn" and a colleague brought kilo quantities of cocaine from Madison to Chicago every two weeks; the cars they drove had stash boxes by the dashboards, and that Mays and Hurn each possessed handguns

which they kept in their apartment. Detective Johnson vouched for the CI's veracity by saying that "CI 862 has provided information regarding persons who sell controlled substances, which your complainant has independently corroborated." A criminal records check revealed that Hurn had a felony conviction.

Finally, Detective Johnson requested permission to perform a no-knock entry because of the danger presented by the guns believed to be in the apartment.

On June 2, 2005, a Dane County Circuit Court issued the requested warrant and authorized no-knock entry. The court did not explicitly address in its warrant whether the police were required to execute the warrant during the daytime or at any time of the day or night.

On June 3, 2005, police executed the warrant some time between 5:00-5:10 a.m.

B. Probable Cause

Probable cause exists when the circumstances, considered in their totality, induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *United States v. Mykytiuk*, 402 F.3d 773, 776 (7th Cir. 2005). When the police use informants to establish probable cause, the credibility assessment should consider whether the informant personally observed the events reported, the degree of detail she provides, whether the agents have independently corroborated the information, and the age of the information. *Id.*[1] Put

[1] A fourth factor in *Mykitiuk*, a search warrant case, is whether the informant personally appeared before the issuing judge so that the judge could make his/her own credibility determination. *See id.*

another way, probable cause exists when, given all the circumstances known to the agents, including the veracity and basis of knowledge of informants providing hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Newsome*, 402 F.3d 780, 782 (7th Cir. 2005).

Probable cause is a fluid concept that relies on the common-sense judgment of the officers based on the totality of circumstances known to them. In determining whether suspicious circumstances rise to the level of probable cause, officers are entitled to draw reasonable inferences based on their training and experience. *United States v. Reed*, *supra,* 443 F.3d 600, 603 (7th Cir. 2006). "So long as the totality of the circumstances, viewed in a common sense manner, reveals a probability or substantial chance of criminal activity on the suspect's part, probable cause exists." *United States v. Parra*, 402 F.3d 752, 763-64 (7th Cir. 2005). It is not appropriate to consider each piece of evidence individually in a "divide and conquer" approach; rather the focus must be on what the evidence shows as a whole. *United States v. Caldwell*, 423 F.3d 754, 760 (7th Cir. 2005). So, for instance, while staleness of evidence is a salient factor, if other factors indicate that this information nonetheless is reliable, then the court may consider it as part of the probable cause *gestalt*. *United States v. Newsom*, 402 F.3d 780, 782-83 (7th Cir. 2005).

This segues to Hurn's challenge to the information attributed by Detective Johnson to her informant. Hurn accurately notes that it is impossible to discern which information the informant provided in October, 2004, and which the informant provided in June, 2005.

Therefore, the court shall presume that all of the information was provided on the earlier date, seven or eight months before the warrant application.

Hurn alleges that Detective Johnson intentionally attempted to mislead the issuing court by implying that stale information actually was fresh. Anything is possible, but the shortcomings of the combined presentation are palpable, so if the intent was to mulct the court, it wasn't a very refined attempt. It's equally likely that the opacity clouding the affidavit is the result of careless drafting.

Similarly, Detective Johnson's headline-version presentation of her informant's track record is too vague to be useful. Absent specifics (for instance, how long the informant has worked with the police, the number of pieces of information provided and corroborated, the materiality and non-obviousness of that information, whether any arrests or convictions resulted from the informant's tips, whether the informant's tips ever had been proved incorrect, *etc.*), this informant must be deemed "of unknown reliability." *See United States v. Brack*, 188 F.3d 748, 755-56 (7th Cir. 1999); *United States v. Koerth*, 312 F.3d 862, 867 (7th Cir. 2002).

Even unproven informants, however, can provide useful information; sometimes their tips are sufficient, without more, to establish probable cause. *Koerth*, 312 F.3d at 867-68. In this case, the informant's stale report is not sufficient standing alone to establish probable, notwithstanding the detailed, first-hand information provided about Hurn, Mays and Hurn's drug-selling partner. But the results of the repeated trash picks lent credence to the

informant's reports and provided a set of recent dots on the evidentiary line that led to probable cause to search Hurn's residence for evidence of drug crimes.

Hurn dismisses what the police recovered from his trash as sound and fury over virtually nothing, but as the government responds, the trash picks established probable cause all by themselves. The frequency and amount of the baggie corner evidence, combined with recovery of cocaine residue on three separate dates, established that somebody in Hurn's residence repeatedly was packaging cocaine for resale. Add to the mix the informant's stale report of regular, large scale drug trafficking by Hurn and Mays, and there is more than enough evidence to support a search warrant.

C. The Good Faith Doctrine

Even if probable cause did not support this warrant, suppression would be inappropriate unless the police lacked good faith in relying on the warrant. *United States v. Sidwell*, 440 F.3d 865, 869 (7th Cir. 2006), citing *United States v. Leon*, 468 U.S. 897, 920-22 (1984). An officer's decision to seek a warrant is prima facie evidence that she was acting in good faith; a defendant may rebut this prima facie evidence only by establishing that the issuing judge wholly abandoned her judicial role, or that the warrant affidavit was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable. *Id.*

Hurn takes a stab at establishing bad faith by accusing Detective Johnson of attempting to mislead the state court with a vague affidavit. It is most unlikely that the

court actually was misled and there is no indication that the court abandoned its neutrality when considering the warrant application. Further, as noted above, the obvious vagueness imbuing the affidavit would have hurt the police more than it helped them, but even as written the affidavit was not so bare-bones as to render police reliance on the warrant unreasonable. So, if it were to matter, the good faith doctrine would rescue this warrant.

III. Early Entry

Hurn argues that even if the warrant was valid, the police violated his Fourth Amendment rights by executing it at nighttime without court authorization. Therefore, this court must suppress of all evidence seized pursuant to the warrant.

It is debatable whether the 5:00 a.m. entry was constitutionally unreasonable, but even if it was, this situation is analogous to, and most probably governed by, the Supreme Court's recent decision in *Hudson v. Michigan*, 547 U.S. ___, ___ S.Ct. ___, 2006 WL 1640577 (June 15, 2006). In *Hudson*, the state conceded that the police had not knocked and announced prior to entering to execute their search warrant. The question presented to the court was whether the exclusionary rule was available to the defendant as a remedy to this Fourth Amendment violation. Over vigorous dissent, the Court ruled that it was not, reasoning that

> Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large. We have therefore been

> cautious against expanding it, and have repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application. We have rejected indiscriminate application of the rule, and have held it to be applicable only where its remedial objectives are thought most efficaciously served, that is, where its deterrence benefits outweigh its substantial social costs.
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> Whether the exclusionary sanction is appropriately imposed in a particular case is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.
>
> In other words, exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. . . . In this case, or course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred or *not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.
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> 2006 WL 1640577 at *4, citations omitted, emphasis in original.

This reasoning is applicable to Hurn's situation because his claimed ground for suppression is that state officers executing a state warrant failed to comply with F.R. Crim. Pro. 41(a)(2)(B), which defines "Daylight" to commence at 6:00 a.m. Assuming, *arguendo*, that this federal rule even applies to local police, then violating it would be equivalent to violating 18 U.S.C. § 3109, the federal statute requiring a knock-and-announce entry for federal statutes. As *Hudson* demonstrates, simply violating a federal statute governing how to execute a search warrant isn't a basis to suppress evidence. As *Hudson* further

demonstrates, adding the *gravitas* of an undisputed Fourth Amendment violation to the analysis does not change the outcome: an illegal manner of entry isn't a basis to suppress evidence. This essentially ends the analysis.

If it were necessary to delve deeper, I would conclude that no Fourth Amendment violation occurred. First, the Madison police did not violate Rule 41 because it did not apply to their warrant at the time they executed it and there is no basis to impose it *ex post*. Frankly, it wouldn't even matter if the police violated *state* law when they executed their warrant; the operative question is whether this particular early entry violated the Fourth Amendment. The touchstone of any Fourth Amendment inquiry is reasonableness, measured by the totality of the circumstances and determined by balancing the degree to which a challenged action intrudes upon an individual's privacy and the degree to which the action promotes a legitimate government interest. The reasonableness requirement extends to the manner in which a search is conducted. *Green v. Butler*, 420 F.3d 689, 694-95 (7th Cir. 2005).

Here, Madison police obtained a no-knock warrant from a state court judge, authorizing unannounced entry into Hurn's house due to the perceived danger presented by the possible presence of firearms and the nature of the crimes under investigation. The parties have not cited any state court equivalent to the federal "daylight" rule and I did not find one at Wis. Stats. § 968.10 *et seq*. [2] Therefore, the police appear to have complied with

[2] It may be that under state practice, obtaining no-knock authorization is a de facto authorization of night time entry, but because the record is silent, I conclude that it is not.

all applicable state laws and procedures. At least one federal circuit court has equated nighttime entry with no-knock authorization, approving non-daylight execution of search warrants when there is a substantial risk of destruction of evidence or when there is a risk of personal injury and property damage (in this case due to the volatile nature of the chemicals used to cook methamphetamine). *United States v. Tucker*, 313 F.3d 1259, 166 (10th Cir. 2002). Therefore, it is less unreasonable–perhaps even reasonable–to enter before 6:00 a.m. if the goal is to reduce an articulable danger to officers.

Further, although the police entered before "daylight" as defined by the federal rule (which was not applicable to them at the time and about which they probably had no knowledge), they entered as day was dawning: on June 3, 2005, the sun rose in Madison at about 5:20 a.m. But even though darkness was abating, "daytime" cannot be based on light *versus* darkness: the sun rises as late as 7:12 a.m. in December and it never sets later than 8:41 p.m., long before the 10:00 p.m. cutoff for a presumptively reasonable entry. On the other hand, if "daytime" is meant to capture the period when most people are awake, where is the empirical data backing up this choice? If, as one might reasonably suspect, many people regularly sleep past 6:00 a.m., then why is it any less reasonable as a practical matter to roust such people from their beds at five instead of six? Perhaps there is a sliding scale of unreasonableness: the farther the police get from one of the end points of "daytime," the less reasonable their actions, with 2:00 a.m. being the nadir.

The upshot of this is that on these facts, it was not constitutionally unreasonable for the officers to enter Hurn's house at 5:00 a.m. The police had a legitimate fear of armed resistence, they had obtained a no-knock warrant from the court, they went in only one hour before "daytime," it was beginning to get light, and there is no evidence that Hurn would have been awake at 6:00 a.m. and therefore less inconvenienced by an entry 60 minutes later.

IV. Identifying the Informant

Finally, Hurn seeks the identity of Detective Johnson's informant. The government has asserted its privilege to withhold this information and Hurn has not shown that the informant's identify is relevant or helpful to his defense or essential to a fair determination of this case. *See United States v. Banks*, 405 F.3d 559, 564 (7th Cir. 2005), citing *Roviaro v. United States*, 353 U.S. 53, 59-61 (1957). As noted above, the informant was a mere tipster on a warrant, one whose information has been accorded minimal probative value by this court. Therefore, Hurn is not entitled to learn the informant's identify.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend this court deny defendant Mark Hurn's motions to suppress evidence and motion to disclose the informant's identity.

Entered this 23rd day of June, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

June 23, 2006

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Re: United States v. Hurn
Case No. 05-CR-085-S

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 3, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 3, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable John C. Shabaz, District Judge