IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

05-cv-731-bbc

v.

REAL PROPERTY LOCATED AT 7199
GRANT ROAD, ARPIN, WOOD COUNTY,
WISCONSIN, WITH ALL APPURTENCES
AND IMPROVEMENTS THEREON,

Defendant.

- -

This is a civil action for forfeiture brought pursuant to 21 U.S.C. § 881(a)(7), which authorizes the government to seize any real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment." The government contends that claimant Allen Oleson violated 21 U.S.C. § 841 by using his home to grow (or "manufacture" in the words of the statute) marijuana.

Two motions are before the court: (1) claimant's motion to suppress all evidence derived from the warrant to search his house; and (2) plaintiff's motion for summary

judgment. For the reasons set forth below, claimant's motion will be denied and plaintiff's motion will be granted.

From the parties' proposed findings of fact and the record, I find the following facts to be undisputed.

UNDISPUTED FACTS

On December 9, 2005, state investigator Mark Neuman filed an affidavit with the Circuit Court for Wood County, Wisconsin for a warrant to search a home located at 7199 Grant Road in Hansen, Wisconsin and occupied by claimant Allen Oleson. Most of the information in the affidavit was provided by Seth Oliver, who had told Neuman the following:

- Oliver had bought marijuana from claimant in the past and had been to claimant's residence "several times";
- claimant told Oliver that he grew marijuana "on his premises";
- on December 8, 2005, Oliver broke into claimant's residence, saw three different types of "approximately 50 plants worth of marijuana" and stole some of it;
- claimant called Oliver, demanding $3000 for the marijuana he stole, which Oliver interpreted as a threat and prompted him to go to the police.

Oliver took Neuman to 7199 Grant Road and identified it as claimant's residence. Neuman confirmed this through the records of the Wood County sheriff's department. In addition, Neuman ran tests on the substance Oliver said he stole from claimant. The tests were positive for the presence of THC.

The state court judge issued the warrant. At claimant's residence, officers found a room with black tar paper covering the windows. Inside that room, they found the following items:

- glass aquariums
- grow lights
- portable heat fan
- extension cord with a timer
- gallon jar
- hotplate
- 600 count box Petri dishes
- two bags of Miracle Gro
- cardboard jiffy pots
- citric acid
- 16 packages of surgical blades

Elsewhere in the residence, officers found the following:

- marijuana totaling 809.6 grams
- marijuana seeds
- marijuana stalks and branches
- marijuana roaches
- smoking pipes and a bong
- five boxes of pint sized plastic bags

The evidence located in claimant's residence is consistent with an operation for growing of marijuana. Neuman conducted a field test on the marijuana seized from the property; the test confirmed the presence of THC.

On December 12, 2005, Oleson was charged in Wood County Case Number 2005-CF-506 with Manufacture/Delivery of THC (>1000-2500 grams), Possession with Intent to Deliver THC (>1000-2500 grams), Maintaining a Drug Trafficking Place, Possession of Drug Paraphernalia, and Possession of Amphetamine/LSD/Psilocin. According to electronic records maintained by the Wisconsin Circuit Access Program (http://wcca.wicourts.gov), claimant was later convicted of Manufacture/Delivery of THC (>1000-2500 grams) and Maintaining a Drug Trafficking Place.

OPINION

A. Claimant's Motion to Suppress

Claimant advances two grounds in support of his motion to suppress: (1) "[t]here is an underlying violation of Franks v. Delaware, 438 U.S. 154 (1978)"; and (2) the search warrant was not supported by probable cause. Claimant's citation to Franks misses the mark because that case applies only when the movant makes a showing that the search warrant included deliberately false material or recklessly disregarded the truth. United States v. Jackson, 65 F.3d 631, 635 (7th Cir. 1995). Although claimant makes a conclusory allegation in his motion that "there [were] material misrepresentations or admissions made intentionally or with reckless disregard for the truth in the affidavit for [the] search warrant," Clt.'s Mot., dkt. #69, at 2, he does not identify any statements in the warrant that were false or misleading. Rather, the only argument he develops is that the information in the warrant was insufficient to support a finding of probable cause.

A court that is asked to issue a search warrant must determine whether probable cause exists by making a practical, common-sense decision: Given all the circumstances, is there 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 (1983)). A reviewing court must afford "great deference" to the issuing court's determination that probable cause existed. United States v. McIntire, 516 F.3d 576, 578 (7th Cir. 2008),

For the most part, the parties agree on the factors a court must consider when

determining whether information from an informant is sufficient to establish probable cause: whether the informant's knowledge comes from personal observation, the level of detail he provides and the extent to which the police have corroborated his statements. Claimant identifies the fourth factor as the time between the informant's observations and the application for the warrant while plaintiff says it is whether the informant testified before the issuing judge. Both of these are factors identified by the Court of Appeals for the Seventh Circuit in some cases, though the court has not been entirely consistent in its enumeration of the factors. Compare United States v. Garcia, 528 F.3d 481, 486 (7th Cir. 2008) (using factors discussed by claimant), with United States v. Olson, 408 F.3d 366, 370 (7th Cir. 2005) (using factors discussed by plaintiff), and United States v. Koerth, 312 F.3d 862, 866 (7th Cir. 2002) (using all five factors). Because the ultimate question is whether the information provided is reliable, the precise formulation of the test is not important.

Claimant does not deny that most of these factors favor plaintiff. Oliver provided specific information on the basis of personal observations he had made as recently as the day before the affidavit was filed: claimant told Oliver he grew marijuana, Oliver purchased marijuana from claimant in the past and he saw approximately 50 marijuana plants at claimant's residence. In addition, plaintiff independently confirmed claimant's address and the identity of the substance as marijuana.

It is true as claimant observes that the police did not conduct a wiretap or witness a

"hand-to-hand buy," but claimant cites no authority requiring such exacting evidence to support a finding of probable cause. Rather, he concedes that the facts in this case are similar to those in Garcia, 528 F.3d at 486, a case in which the court of appeals upheld the issuance of a warrant supported by an informant's testimony.

Claimant says the crucial difference is that in Garcia, the informant had provided reliable information to police in the past. Although that fact is missing in this case, it is not required: "[T]here is no inevitable requirement of corroboration or a history of accurate information from the informant in question." McIntire, 516 F.3d at 579.

In any event, I agree with plaintiff that any reliability concerns are adequately addressed by the fact that Oliver was confessing to a crime at the same time he was providing information about claimant. United States v. Harris, 403 U.S. 573, 583 (1971) ("Admissions of crime . . . carry their own indicia of credibility – sufficient at least to support a finding of probable cause to search.") This was not a case in which the informant implicated someone else after being caught breaking the law. Williamson v. United States, 512 U.S. 594, 607-08 (1994) ("A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation."). Rather, he confessed to the police on his own accord, implicating himself and claimant in the same breath.

Because a "sensible judge could find that this adds up to probable cause," McIntire, 516 F.3d at 579, I must deny claimant's motion to suppress.

B. Plaintiff's Motion for Summary Judgment

Plaintiff has the burden to prove by a preponderance of the evidence that the property has a "substantial connection" with growing marijuana. 18 U.S.C. § 983(c). I have already concluded once that plaintiff satisfied that standard when I granted plaintiff's motion for summary judgment filed in 2006. Dkt. #41. (The court of appeals vacated the judgment and remanded the case to this court after concluding that I erred in failing to appoint counsel to claimant under 18 U.S.C. § 983(b)(2)(B). Dkt. #56.) However, the first time around, plaintiff's motion was unopposed. This time, claimant disputes a number of plaintiff's proposed facts, including inculpatory statements claimant allegedly made to the investigator. In addition, claimant avers that he had black tar paper on his windows "to assist in making soap," dkt. #74, at 1, and that many of the other items found were "used to attempt to start a tissue culture business propagating cranberry vines," id.

Claimant's averments do not pass the laugh test, particularly in light of his conviction for manufacturing marijuana. (Plaintiff does not argue that claimant is precluded from contradicting facts underlying his conviction, so I do not consider that issue.) Even if I were required to accept his explanations for the purpose of summary judgment, he cannot explain

away the most incriminating items found in his house, such as the large quantity of marijuana, marijuana seeds and marijuana stalks and branches, none of which he denies were present. (With respect to some of these items, claimant says he "neither admit[s] nor den[ies] these." Dkt. #74, at 3. However, under Fed. R. Civ. P. 56 and this court's summary judgment procedures, by failing to deny plaintiff's proposed finding of fact, claimant has admitted it for the purpose of plaintiff's motion for summary judgment. Fed. R. Civ. P. 56(e)(2); Procedure to Be Followed on Motions for Summary Judgment.II.C-D.) It is difficult to imagine any reason that marijuana seeds and plants would be present in someone's house unless the person were growing marijuana. Even claimant's creative imagination has not produced an alternative scenario.

A court must grant a motion for summary judgment if the evidence shows that no reasonable jury could render a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Plaintiff has more than met that standard in this case.

ORDER

IT IS ORDERED that

1. Claimant Allen Oleson's motion to suppress, dkt. #69, is DENIED.

2. The motion for summary judgment filed by plaintiff United States of America, dkt.

#64, is GRANTED on plaintiff's claim that defendant Real Property Located at 7199 Grant Road, Arpin, Wood County, Wisconsin, with all appurtences and improvements thereon, was used to facilitate the manufacturing of marijuana in violation of 21 U.S.C. § 841 and is therefore subject to forfeiture pursuant to 21 U.S.C. § 881. The clerk of court is to enter judgment of forfeiture in favor of plaintiff and close this case.

Entered this 1st day of August, 2008.

BY THE COURT:

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BARBARA B. CRABB
District Judge