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

UNITED STATES OF AMERICA,

Plaintiff,

v.

EUGENE R. LOUGHREN,

Defendant.

REPORT AND RECOMMENDATION

06-CR-23-C

REPORT

The grand jury has charged defendant Eugene R. Loughren with conspiring to distribute more than 500 grams of methamphetamine and with actually possessing methamphetamine with intent to distribute it. The methamphetamine charged in Count 2 was recovered by police executing a search warrant for Loughren's home in Superior. Before the court for report and recommendation are Loughren's separate but related motions to suppress evidence. *See* Dkts. 10 - 12. For the reasons stated below, I am recommending that the court deny all three motions.

BACKGROUND

I. The Search Warrant Affidavit and the Trash Picks

Loughren's primary challenge is to the search warrant, which he claims contained false information and lacked probable cause. His secondary challenge is to a brace of trash picks, evidence from which he wishes to suppress in its own right and to exclude from the search warrant affidavit.

The search warrant affidavit is attached to Loughren's first brief (dkt. 28). On November 15, 2004 Superior Police Department Investigator John M. Nordberg prepared this affidavit and submitted it to the Circuit Court for Douglas County. In this case, the warrant affidavit does *not* speak for itself, at least not completely: at an April 12, 2006 telephonic hearing on Loughren's request for a *Franks* hearing,[1] the government agreed to edit paragraph (7) of the probable cause section by replacing the challenged sentence with a transcript of the referenced informant's recorded confession to the police. *See* dkt. 14. Therefore, this sentence of paragraph (7) is out:

> CI #1 stated CI #1 had been present during at least ten methamphetamine transactions, and all of them happened in Loughren's garage.

It is replaced with this:

> CI #1 stated that Blom goes to Loughren's place and the drug deals happen in the garage. CI #1 stated that although he has never been in the garage, he knows that Loughren keeps drugs in the garage because he has sat outside Loughren's house on more than 10 occasions waiting for someone who would go inside the garage to come out.

See Govt. Brief in Opposition, Dkt. 29, at 6.

Loughren also challenged the veracity of Investigator Nordberg's version of the trash picks reported in paragraphs (2) & (3) of his affidavit. Investigator Nordberg claims that on June 26, 2003, he and another detective conducted a trash pick of a garbage can located in the public alley behind Loughren's residence and recovered a single Ziploc sandwich bag with

[1] *Franks v. Delaware* 438 U.S. 154 (1978).

the top cut off below the ceiling mechanism, which he deemed consistent with powder controlled substance packaging. Investigator Nordberg also reported a March 31, 2004 trash pick with another detective from which they recovered a one-gallon Ziploc bag that smelled of fresh marijuana, along with two small Ziploc bags containing white powder consistent with methamphetamine residue.

Loughren seeks to excise paragraphs 2 and 3 from the search warrant affidavit on the ground that Investigator Nordberg violated Loughren's Fourth Amendment by invading the curtilage of Loughren's home. This challenge led to a two-part evidentiary hearing on June 21, 2006 and August 7, 2006. Having heard and seen the witnesses testify (except Antoinette Schmidt, who testified telephonically), having considered the photographs and other exhibits, and having made credibility determinations, I find that on both days, Investigator Nordberg and his colleagues took trash from Loughren's trash cans after the cans had been set out for collection on the edge of the alley. The police did not invade Loughren's curtilage to pick trash on June 26, 2003 or March 31, 2004.

These findings of fact are cursory but such terseness is appropriate in this case. The only salient fact for each trash pick is the location of Loughren's trash cans at the time the police pulled the trash bags out of them. I have found that the trash cans were near the alley, not near Loughren's house. A more detailed presentation of interstitial facts would not change this outcome. I have considered the logic of each witness's testimony and the corroboration (or lack thereof) provided by others. The bottom line is that I have accepted

the officers' testimony that they did not violate the "golden rule" of trash picks by entering Loughren's curtilage to retrieve his bags of trash.

Therefore, the evidence set forth in paragraphs (2)-(3) of the search warrant affidavit, meager though it may be, remains in the mix. The evidence recovered from the trash cans, though not innocuous, is only minimally relevant to this prosecution; indeed, the bag redolent of marijuana might not be admissible at all at a methamphetamine trial. Similarly, the challenged search warrant does not rise or fall on the trash picks, but on the information provided by the four informants.

Finally, I am declining Loughren's request to edit the search warrant affidavit to provide the name of "CI #1" in paragraph (7). It was not a *Franks* violation for Investigator Nordberg to protect the identity of his informant when seeking this search warrant. The case law on probable cause adequately accounts for this routine occurrence.

Taking all of this into account, here is a synopsis of the facts in the edited search warrant affidavit that this court must review to determine if it provided probable cause to search Loughren's residence:

As of November 2004, Investigator Nordberg had been with the Superior Police Department for over eight years and was assigned to it Vice/Narcotics Bureau. Investigator Nordberg had been investigating Loughren for about two years and possessed unspecified background information from a variety of sources indicating that Loughren had been using and dealing methamphetamine for several years.

On June 26, 2003, Investigator Nordberg found in Loughren's trash a 3" x 4" Ziploc bag cut off just below the sealing mechanism, which he deemed consistent with packaging for powdered controlled substances.

On March 21, 2004, a woman named Jessica Violet Bidler was arrested for a probation violation. Investigator Loughren had background information that Bidler had been buying methamphetamine from Loughren and reselling it. Investigator Nordberg asked Bidler about this; Bidler told him that Loughren recently had observed someone poking through his garbage, which made Loughren paranoid. According to Bidler, Loughren stopped selling methamphetamine due to this incident.

On March 31, 2004, Investigator Nordberg retrieved from Loughren's garbage a one gallon Ziploc bag that smelled of fresh marijuana and two small Ziploc bags containing a white powder residue consistent with methamphetamine residue.

In the "Spring of 2004" an informant identified as "CRI #1" told Investigator Nordberg that Loughren had been selling large quantities of methamphetamine in the Duluth/Superior area. CRI #1 claimed to have worked for Loughren when he was operating "The Food Dudes" business in Duluth; CRI #1 told Investigator Nordberg that he used to buy controlled substances from Loughren in the past but no longer was allowed to deal directly with Loughren due to a disagreement. CRI #1 had provided reliable information to Investigator Nordberg in the past, including information that had led to the issuance of at least two search warrants and two arrests for controlled substance charges. CRI #1 had

participated in at least six other undercover operations that had led to controlled substance convictions. CRI #1 previously had testified in state and federal court and had made statements against his/her penal interests.

Investigator Nordberg reported that he had received information from a colleague, Investigator Nicholas Alexander, regarding admissions made on November 12, 2004 by a different confidential informant, "CI #1." According to Investigator Alexander, CI #1 stated that since August 2004 he had been buying methamphetamine from Loughren through an intermediary named Charles Blom. CI #1 reported that he had purchased methamphetamine from Blom more than once in the past week. The last time that CI # 1 bought methamphetamine from Blom, he watched Blom walk from Loughren's garage to their meeting place. CI # 1 stated that Blom goes to Loughren's place and the drug deals happen in the garage. CI #1 stated that although he has never been in the garage, he knows that Loughren keeps drugs in the garage because he has sat outside Loughren's house on more than 10 occasions waiting for someone who would go inside the garage to come out.

Investigator Alexander also told Investigator Nordberg that on November 15, 2004 (the day that Nordberg was drafting his warrant application), Blom had confessed to working with Loughren as his "guy" for the last six months selling methamphetamine. Blom reported that he had received methamphetamine from Loughren almost daily for the last six months, and on the day of his arrest, namely November 13, 2004, he had received methamphetamine from Loughren. Blom claimed to have received an average of two ⅛

ounce quantities of methamphetamine per day for the last six months. Blom claimed that Loughren kept saleable amounts of methamphetamine in his garage and kept the bulk of his stash in his residence. Blom further reported that Loughren kept large quantities of currency from drug sales in his residence. According to Blom, Loughren had surveillance cameras operating outside his residence, monitors located in the attic, and possessed loaded and easily accessible handguns.

ANALYSIS

I. The Trash Picks

Loughren directly attacks the trash picks performed by police at his residence and challenges the derivative use of the evidence obtained from his trash as part of Investigator Nordberg's search warrant affidavit. The parties agree on the applicable law: if the police seized trash bags out of trash cans adjacent to Loughren's home (which is Loughren's version of events), then the police violated Loughren's Fourth Amendment rights and the evidence must be suppressed. If the police seized the trash bags out of trash cans left for pickup adjacent to the back alley (the officers' version of events), then there was no constitutional violation, the evidence should not be suppressed, and paragraphs (2) and (3) of the search warrant affidavit need not be excised. *See California v. Greenwood*, 486 U.S. 35, 37 (1988); *United States v. Shanks*, 97 F.3d 977, 979-80 (7th Cir. 1996).

As noted above, I have found that the police retrieved Loughren's trash from receptacles left adjacent to the alley. While either side's version of events could have been

true and some witnesses on each side had their own biases and motives to shade testimony, I am more convinced by the officers' testimony than by Loughren's.[2] By way of example, why would the officers fabricate testimony regarding the location of the yellow warning tape? They had no reason even to mention this detail in their reports, the warrant affidavit or their testimony unless things occurred as they said. If, as Loughren implies, the police walked around the warning tape onto his curtilage to retrieve his trash, why would they risk compounding their lie by claiming not only that the trash cans were by the alley, but that the tape was *tied* to a trash can? Contrariwise, it is logical for Loughren to observe that because the city's trash collector lifts trash cans mechanically, warning tape tied to a can would rip off upon collection of the trash. Did the officers, in the dark, mistakenly infer that the tape was tied to the trash can when the tape actually was tied to a metal pole directly behind the trash can? I don't know, and it doesn't really matter because I am persuaded by the officers testimony on the big issue: they did not encroach upon Loughren's curtilage to retrieve his trash. Therefore, I am recommending that this court deny Loughren's motion to suppress this evidence.

[2] The testimony of Loughren's neighbors added nothing worthwhile to the analysis and didn't cut strongly in either direction.

II. Editing the Search Warrant Affidavit

Loughren claims that Investigator Nordberg made material misstatements and presented evidence derived from illegal trash picks in his search warrant affidavit. As noted just above, I am recommending that this court deny Loughren's motion to suppress the trash picks; therefore, there is no need to excise paragraphs (2) - (3) of the affidavit.

As for Loughren's challenge to Investigator Nordberg's report of CI#1's admissions in paragraph (7), the government agreed to replace the contested sentence version of events with a more accurate one, set forth in the synopsis of the affidavit above. This agreement obviated the need for a *Franks* hearing by jumping straight to the question whether Investigator Nordberg's mischaracterization of CI #1's statement was necessary to support the finding of probable cause. *See Franks*, 438 U.S. at 171-72; *United States v. Childs*, 447 F.3d 541, 546 (7th Cir. 2006)(ultimate question in a *Franks* analysis is whether the affidavit, when stricken of the false information, nevertheless sufficient to establish probable cause for the issuance of the warrant); *United States v. Walker*, 25 F.3d 540, 545 (7th Cir. 1994)("Even absent Ward's prior statements, sufficient evidence from a variety of other unimpeached sources included in the warrant justified probable cause, obviating the need for a *Franks* hearing").

Because this court is reviewing a different affidavit than that relied upon by the state court and Investigator Nordberg, the probable cause analysis will end the inquiry: a warrant quashed under *Franks* cannot be rescued by the good faith doctrine of *Leon*, 486 U.S. 897

(1984). *See United States v. Garey*, 329 F.3d 573, 577 (7th Cir. 2003) *citing Illinois v. Gates*, 462 U.S. 213, 263-64 (1983) (White, J., concurring).

III. Probable Cause

Probable cause exists when, given all the circumstances known to the agents, including the veracity and basis of knowledge of an informant 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). "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, 760-61 (7th Cir. 2005); *see also United States v. Olson*, 408 F.3d 366, 371-72 (7th Cir. 2005)(small tidbits of corroborative evidence in a search warrant affidavit have little weight individually, but taken together can suffice to corroborate an informant's story).

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 United States v. Funches*, 327 F.3d 582, 586 (7th Cir. 2003) (probable cause determination does not require resolution of conflicting evidence that

preponderance of evidence standard requires); *Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting) (probable cause exists somewhere below the 50% threshold).

When police use informants to establish probable cause, the credibility assessment should consider whether each CI personally observed the events reported, the degree of detail he or she provided, whether the agents have independently corroborated the information, the age of the information, and whether the CI personally appeared before the issuing judge for a credibility determination. *United States v. Mykytiuk*, 402 F.3d 773, 776 (7th Cir. 2005). *See also United States v. Olson*, 408 F.3d 366, 370 (7th Cir. 2005).

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). Even so, 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.

When informants start pointing fingers as a result of their own arrest, courts must weigh their allegations carefully. On the one hand, an informant'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. Olson*, 408 F.3d 366, 371 (7th

Cir. 2005); *United States v. Johnson*, 289 F.3d 1034, 1039-40 (7th Cir. 2002) (collecting recent cases). On the other hand,

> 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.

Williamson v. United States, 512 U.S. 594, 607-08 (1994)(Ginsberg, Blackmun Stevens and Souter, JJ. concurring in part and concurring in the judgment). Such statements are inherently suspect. *Id.*; *see also id.* at 601 (opinion of the court); *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993).

Which is not to say that informants don't play a valuable role in helping the police root out crime, *id.* at 334-35, but their value depends on the police and the courts ensuring the integrity of the system by closely scrutinizing them and their claims. *Id; 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); *see also Molina ex rel. Molina v. Cooper*, 325 F.3d 963, 970-71 (7th Cir. 2003) (informant's detailed testimony linking the suspect to the drug conspiracy based on first-hand observation and partially corroborated by the police are strong indicia of the informant's reliability).

Applying this legal template to Investigator Nordberg's affidavit establishes that there was probable cause to support the search warrant. The most salient information, as

Loughren acknowledges, comes from Charles Lester Blom, who anointed himself "Loughren's guy" and detailed to the police a six-month, ongoing drug selling relationship with Loughren headquartered at Loughren's house and garage. Blom's admissions by themselves almost certainly establish probable cause, but Investigator Nordberg corroborated them with detailed narratives from CI #1, CRI #1 and Jessica Violet Bidler. True, some of this information is old, and CI #1 appears to be a new, untested informant. Loughren does the best job he can to chip away at these witnesses individually, trying to scratch some holes in the believability and relevance of their accounts. His efforts fall short: when these four reports of Loughren's drug-selling are collected in one affidavit, they easily surpass the low evidentiary threshold of probable cause. Indeed, the synergistic puissance of these accounts renders the challenged trash pick evidence expendable to the probable cause determination. Adding this information puts two more small bricks into a wall already solid enough to support a probable cause determination. Loughren is not entitled to have the search warrant quashed and this court should not suppress any evidence.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend this court deny defendant Eugene Loughren's three motions to quash the warrant and suppress evidence.

Entered this 1st day of September, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

September 1, 2006

Laura A. Przybylinski Finn
Assistant U.S. Attorney
P.O. Box 1585
Madison, WI 53701-1585

Jonas Bednarek
Bednarek Law Office, S.C.
409 East Main Street, Ste. 2L
Madison, WI 53703-4259

Re: United States v. Eugene R. Loughren
Case No. 06-CR-023-C

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 September 11, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by September 11, 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 Barbara B. Crabb, District Judge