IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JODY W. LOWE,

Defendant.

OPINION AND ORDER

06-CR-0122-C-01

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Defendant Jody W. Lowe has filed objections to the report and recommendation entered by the United States Magistrate Judge on November 17, 2006, recommending denial of defendant's motion to quash the search warrant issued for the search of his residence on February 8, 2006, and to suppress the evidence seized during the execution of the warrant. Defendant contended that the affidavit supporting the application for the search warrant contained false material statements and that the warrant would not have issued if these statements were stricken, as they should have been.

The magistrate judge found that the warrant had been sloppily drafted, or more accurately, sloppily redrafted, so that it included a number of statements of Special Agent Tim Schultz of the Wisconsin Department of Justice and identified him as the affiant. In

fact, Schultz had arranged with Detective Paul Becker of the Eau Claire Police Department to have Becker swear to the affidavit. Becker had asked the Eau Claire District Attorney to revise the affidavit to reflect the change in affiants. The district attorney's office prepared the affidavit but failed to make the changes necessary to reflect that Becker was the affiant. As a result, the affidavit includes a number of misstatements, but these do not require suppression, individually or in combination.

Everything in the affidavit is essentially true. The misstatements lie in the faulty attribution of the averments. For example, Detective Becker has the same qualifications and training attributed to Agent Schultz in the affidavit, but Detective Becker did *not* receive information directly from Detective Dave Williams in Seattle as the affidavit says he did. Agent Schultz received the information (but not directly from Williams), but he turned all of it over to Becker for review. As the magistrate judge explained, these errors do not require the court to strike these portions of the warrant.

The warrant does not rest on false information, but on accurate information carelessly reported by the preparer of the affidavit. In these circumstances, the underlying rationale for suppression does not exist. The point of the Fourth Amendment is to insure that law enforcement officers seek warrants on the basis of accurate information and not on made up scenarios or unverified tips. In this case, the officers had accurate information sufficient to support the issuance of a warrant; the error lay in the way that information was produced

to the issuing state court judge. I agree with the magistrate judge that the purpose of the exclusionary rule is not implicated in this case.

In an excess of caution, the magistrate judge assumed that the exclusionary rule did apply. He held a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978), to determine whether the affiants had prepared or signed the affidavit intending that it include false information or with reckless disregard to any falsehoods. Defendant never proffered any evidence tending to show intent on the part of Becker or Schultz. The affidavit tends to refute intent on its face, since there is no apparent reason why any affiant with the quantity of information Becker and Schultz had would intentionally undermine their showing of probable cause by not sorting it out correctly.

Defendant argues in support of his objections that allowing the warrant in this case to stand sends the message that law enforcement officers should play dumb, not read their affidavits, not look for any inaccuracies and not correct those that they find. His argument is unconvincing. Even if upholding the magistrate judge's conclusion will give law enforcement officers free rein to play dumb, which I doubt, that outcome is preferable to throwing out evidence on the basis of editing errors.

Defendant notes specific errors in the affidavit: (1) Agent Schultz's alleged qualifications are mere boilerplate typically found in similar affidavits for search warrants and the section contains an averment that undermines Schultz's credibility; (2) Detective

Becker never met with defendant during a 2002 investigation, as the magistrate judge seems to have thought; (3) Agent Schultz never received a packet of information about the Seattle end of the investigation from Detective Williams, as the affidavit stated; (4) Becker's and Schultz's claims of having read the affidavit are incredible in light of the obviousness of the errors in the affidavit.

The averment to which defendant refers in the first alleged error is one in which Schultz (Becker) averred that "a suspect's lack of a prior history of child-related sex offenses is not a determining factor in the outcome of these investigations. The majority of suspects investigated by your affiant who were arrested, charged, and convicted, had no prior record of child sex offenses." The affiant did not say, as defendant suggests, that "an absence of any record of child pornography indicates a probability that one is an offender." Instead, he said that the absence of a record does not negate the possibility that the suspect is an offender. This is not an error and it does not undermine the affidavit's reliability.

Allegation (2) concerns a misstatement that was not part of the challenged affidavit and had no effect on the magistrate judge's conclusion.

Allegation (3) is not a material error. The packet of information Schultz received came from another agent, who had received it from Detective Williams. This extra link in the chain does not affect the affidavit's credibility. Information known to one law enforcement officer is attributable to others as a matter of course.

Allegation (4) has already been addressed. The officers' failure to catch the errors in the affidavit has been discussed at length in the magistrate judge's report and in this order. I do not agree with defendant that Becker demonstrated a reckless disregard for the truth when he missed the errors in the affidavit.

In summary I conclude that defendant has shown no reason to quash the search warrant or suppress the evidence that was seized when the warrant was executed.

ORDER

IT IS ORDERED that defendant Jody W. Lowe's motion to quash the search warrant executed on February 8, 2006 and suppress the evidence seized under it is DENIED.

Entered this 30th day of November, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge