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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND RECOMMENDATION

JASON CARR and
HEATHER LANE,

06-CR-131-S-2
06-CR-131-S-3

Defendants.

REPORT

The grand jury has returned drug charges against defendants Jason Carr and Heather Lane. Before the court for report and recommendation is defendants' joint motion to quash a search warrant for their residence issued by the Eastern District of Wisconsin. Defendants claim that the affiant did not swear to his affidavit, and that the affiant supported his application with unlawfully-obtained evidence from a GPS tracking device, without which the warrant application lacked probable cause. The government opposes the motion, contending that the warrant was properly signed and that there is probable cause to support the warrant even if this court redacts the challenged GPS evidence. The government is correct and I am recommending that this court deny defendants' motion.

I. Background information

The warrant application is docketed as 41 in Carr's case file. A review of the application shows that the affiant was DEA Drug Task Force Agent Robert Brenner (a Waukesha County Sheriff's Deputy). Magistrate Judge William E. Callahan, Jr. was the presiding judge who administered the oath to Agent Brenner and issued the challenged warrant.

As is the practice in the Eastern District of Wisconsin, the affiant and the judge signed only on the cover sheet of the application, which explicitly incorporated the affidavit that follows. In this district the affiant and the judge sign both the cover sheet of the warrant application and the last page of the affidavit, an unnecessarily cautious suspenders-and-belt approach to issuing a search warrant.

Agent Brenner's affidavit contains 92 paragraphs of small-font narrative spread across fifteen typed pages. This affidavit speaks for itself; by way of cursory overview, a knowledgeable informant (CI #1) explained in rich, first-hand detail how Carr and Lane, who lived together in Genesee, Wisconsin, worked as mules for Robert Lowery (the lead defendant in this prosecution) by transporting >100 lb. shipments of marijuana from Lowery's source in Arizona back to Lowery at his compound in Wisconsin. Carr and Lane would keep some of this marijuana and resell it from their home. Three other informants, (CIs ## 2-4) independently identified these suspects and provided similar narratives of their marijuana trafficking conspiracy. CI #1 was able to specify trips by Carr and Lane to

Arizona in January 2006, March 2006 and late April 2006. Task force agents were able to corroborate large portions of the CIs' reports through surveillance of the suspects and by reviewing cell phone records and rental car company records.

On May 1, 2006, CI #1 bought marijuana from Carr at his residence. CI #1 was wearing a body wire; agents heard Carr telling the CI that he and Lane had just brought 170 pounds of marijuana back from Arizona and had escaped police detection during a traffic stop in Oklahoma at which a drug-detecting dog had failed to alert. Police in Texas County, Oklahoma, confirmed to task force agents that this stop had occurred on April 28, 2006 as Carr described it. CI #1 also bought marijuana from Carr at Carr's home on May 18, 2006.

In ¶¶ 49 and 56 of his affidavit, Agent Brenner reports that on April 26, 2006, Agents surreptitiously planted a GPS tracking and recording device on the rental car that Carr and Lane had rented, and that they retrieved the device on April 30, 2006; the GPS indicated that rental car had been driven to Arizona and back.

II. Discussion

As is clear from reviewing the warrant application cover sheet, defendants are mistaken in their claim that the warrant application was not properly sworn to and subscribed before a magistrate judge.

Defendants' bid to quash the warrant by challenging the GPS evidence is no more successful. As noted above, the government has volunteered to redact the information

derived from the GPS device. The government does not concede that it violated the defendants' Fourth Amendment rights by installing or monitoring the device; its position is that there is so much unchallenged information in the affidavit, there is no need to quibble over one inconsequential investigative technique.[1]

Defendants initially contended otherwise, claiming that if any portion of a search warrant affidavit is struck because the information was obtained in violation of the law, then the warrant must fall as a result. Defendants also imply that if the court removes the GPS information from the warrant, there is no probable cause. But, as the government observes, the law of this circuit holds that

> A search warrant obtained in part, with evidence which is tainted can still support a search if the untainted information, considered by itself, establishes probable cause for the warrant to issue. The connection with the unlawful search must be so attenuated as to dissipate the taint. . . . We ordinarily consider whether the illegally obtained evidence affected the magistrate's decision to issue the warrant and secondly, whether the agent's decision to obtain a warrant was prompted by knowledge of the results of the earlier illegal search.

United States v. Gray, 410 U.S. 338, 344 (7th Cir. 2005).

Even a thumbnail sketch of Agent Brenner's affidavit establishes that the government has passed the two-part test of *Gray*: the evidence obtained from the GPS device was

[1] Although the point is moot, I note that in *United States v. Garcia,* 05-CR-155-C, this court conveyed its strong preference that the government seek and obtain judicial approval before installing and monitoring a GPS device, and outlined the potential perils of not doing so.

inconsequential to the court's probable cause determination and it was not a trigger that motivated the agents to seek the warrant or to pursue other avenues of investigation.

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 he provides, whether the agents have independently corroborated the information, and the age of the information. *Id.*[2] Put 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 at 603. "So long as the totality of the circumstances, viewed in a common sense

[2] 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.* That didn't happen here.

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).

As outlined above, the agents used four informants who reported personal knowledge of the defendants' drug trafficking activities and in some cases, direct involvement in it. Indeed, CI #1 twice bought marijuana from Carr in defendants' home and Carr is captured on tape describing his close call while returning from Arizona with a load of marijuana. Cell phone and rental car records corroborated the informants' reports. In sum, there was abundant probable cause to support the warrant, and redacting the GPS information does not affect this conclusion.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court DENY defendants' joint motion to suppress evidence.

Entered this 26th day of October, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

October 26, 2006

David Reinhard
Assistant U.S. Attorney
P.O. Box 1585
Madison, WI 53701-1585

Jonas Bednarek
Bednarek Law Office, LLC
409 E. Main St., 2nd Floor
Madison, WI 53703

Robert W. Keller
Keller Law Office
917 Main Street
Racine, WI 53403

Re: United States v. Carr & Lane
Case No. 06-CR-131-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 November 6, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 6, 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