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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND RECOMMENDATION

RICHARD E. DAVIS,

07-CR-15-S

Defendant.

REPORT

The grand jury has charged defendant Richard E. Davis with unlawful possession of firearms after a felony conviction. Before the court for report and recommendation is Davis's motions to quash the state search warrant that led to the discovery of the charged firearms. *See* dkt. 32. This one is close enough that it could go either way. As discussed below, there was no probable cause to believe that contraband would be found at the apartment of Davis's girlfriend, but Davis does not appear to have established an expectation of privacy in the apartment that would allow him to object to the search. If this remains true, then this court must deny the motion. If the court reaches the merits, it is debatable whether even the good faith doctrine can salvage the lack of a nexus between Davis and the apartment.

THE AFFIDAVIT

On February 13, 2007, at a little past 9:00 p.m., Dane County Narcotics and Drug Task Force Detective Steve Wegner sought and obtained from the Dane County Circuit Court a search warrant for the apartment of Elizabeth Henrich, Davis's girlfriend, located at 2461 Old

Camden Square, Apt. 103, in Madison. Detective Wegner's affidavit is attached to Davis's motion (dkt. 32) and it speaks for itself.

By way of synopsis, Detective Wegner suspected that Davis was a crack dealer and wished to search for drugs, drug records, paraphernalia, and associated items such as firearms. In support of this request, Detective Wegner outlined his own background, which included 19 years as a sheriff's deputy, 3½ years on the task force, specialized training, 500 drug investigations and over 50 search warrants. Detective Wegner set forth a series of expert opinion paragraphs outlining how drug dealers commonly operate and what investigators commonly find in their possession.[1] Detective Wegner then reported the particulars of the Davis investigation:

Madison Police Officer Paige Valenta had been working with an informant to develop Davis as an investigative target. Detective Wegner deemed the informant reliable because he[2] "has assisted in a past narcotics investigation recently that resulted in the successful seizure of over 100 grams of cocaine base, over $7600 and 4 firearms." Search Warrant Complaint at 4. The informant had reported to Officer Valenta that he had known Davis for several years and had done past narcotics transactions with him. The informant reported that he had been with Davis about 2-3 weeks previously when Davis had with him about five or six

[1] Worth noting in this particular case, Detective Wegner outlined how drug dealers often use associates to assist them in the possession and secretion of narcotics *during* a deal, ¶ (n), and that drug dealers often use storage lockers and utility buildings to conceal controlled substances, ¶ (q). Detective Wegner does *not* opine that drug dealers commonly or often cache their drugs, money or related items with family, friends or associates; rather, they commonly store such things in secure locations within their residences,¶¶ (e) & (h), or in motor vehicles registered to themselves or to other people, ¶¶ ((l) & (m).

[2] I do not know the informant's gender so I am just picking one for ease of reference.

eightballs (⅛ ounce, about 3.5 gms.) of crack. The informant reported that a week earlier he had bought an eightball of crack from Davis for $100.

About a month earlier, on January 9, 2007 a task force officer had stopped a vehicle Davis was driving, namely a black Nissan registered to Elizabeth Henrich. Davis had over $2000 cash with him. A call to Henrich revealed that she was Davis's girlfriend and she lived at 2461 Old Camden Square, Apt. 103.

On February 13, 2007, at about 5:22 p.m., the informant called Davis on his cell phone and ordered "a buck fifty," slang for an amount of crack between ⅛ oz. and ¼ oz. Davis agreed to meet the informant at 5326 Hoboken Road, a location where they had met several times previously. Task force agents were in place for surveillance; Detective Wegner already was posted near 2461 Old Camden Square, watching Henrich's Nissan.

At about 6:01 p.m., the informant called Davis's cell phone to ask where he was; Davis advised that he would be pulling up in a minute. Six minutes later, Detective Wegner saw Davis leave the parking lot at 2461 Old Camden Square. About 6:15 p.m., the informant again called Davis's cell phone; Davis responded that he would be there in three minutes, so the informant should step outside. When Davis pulled into the parking lot near 5326 Hoboken Road, officers stopped him and arrested him. A search incident to arrest recovered 0.3 grams of crack from Davis's pocket.

Task force agents then applied for a warrant to search *Henrich's* apartment; I surmise they did not know where Davis lived. This search apparently recovered no drugs; agents did recover the firearms, that are the basis of the § 922(g) charge filed against Davis in this case.

ANALYSIS

Davis argues that the search warrant lacked probable cause because the supporting affidavit did not sufficiently establish the informant's reliability and it did not show any nexus between Davis and 2461 Camden Square Apartment 103 ("Apt. 103"). Davis then argues that the good faith doctrine cannot save this warrant. Davis is onto something, so his motion presents a close call, at least if Davis survives a gatekeeping concern.

I. Davis's Expectation of Privacy in Apt. 103

Before Davis may invoke the Fourth Amendment as ground a basis to quash the search warrant, Davis must established that he had a reasonable expectation of privacy in Apt. 103. *See United States v. Brack*, 188 F.3d 748, 754-55 (7th Cir. 1999), *quoting Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *see also United States v. Torres*, 32 F.3d 225, 229-30 (7th Cir. 1994). Davis has not attempted to do this and there is no other evidence in the record from which the court could infer such an expectation of privacy. As Davis notes, the search warrant affidavit reports merely that Davis sometimes drives his girl friend's car, his girlfriend lives in Apt. 103, and on the date the informant arranged the controlled buy from Davis, Davis drove to their meeting in his girlfriend's car, which had been parked in the lot of her apartment building. This evidence doesn't establish that Davis lived in Apt. 103 or that he was a guest with household privileges. Therefore, Davis has not established a reasonable expectation of privacy that would allow him to seek suppression of evidence seized from that location.

This, by itself, could be a basis upon which to deny Davis's motion. Pursuant to 28 U.S.C. § 636(b), the district judge could allow Davis to amplify the record, but Davis might choose not to do this if he deems the cost/benefit ratio unfavorable. *See Brack*, 188 F.3d at 755. This is a matter that Davis must address during the ten day period for objections to this report and recommendation.

Assuming that further analysis is necessary, I will address Davis's substantive arguments:

II. Probable Cause

As noted, Davis contends that there was no probable cause to support the warrant issued for Apt. 103. 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).

III. The Informant

Davis claims that the search warrant affidavit did not sufficiently establish the credibility and reliability of the police informant who was trying to buy crack from Davis. When police use informants to establish probable cause, the credibility assessment should consider (1) the extent to which the police have corroborated the informant's statements; (2) the degree to which the informant has acquired knowledge of the events through firsthand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and the police officer's application for the search warrant. *United States v. Otero*, Case No. 05-3132, slip op. at 5, ___ WL ___, ___ F.3d ___ (7th Cir. July 19, 2007), *citing United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002). *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); *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).

In this case, Detective Wegner's reactive, on-the-fly affidavit did not provide much information about the informant, but it appears to have provided enough. The informant previously had "assisted" in a past narcotics investigation that resulted in recovery of 100+ grams of crack, four firearms and about $7600 cash. Davis points to the verb "assisted" to challenge the informant's role in the previous investigation. This is a justified critique, and agents would be well advised–particularly in federal court–to provide the details of what their informants said and did that established their reliability. That said, it would have been reasonable for the state court in this case to infer that the informant's information was causal in recovering the listed contraband. This establishes at least some baseline reliability.

Next is the moderately detailed information that the informant provided about Davis. Although the informant provides a believable narrative of his previous interactions with Davis, nothing about the informant's proffer is so detailed or unique as to provide independent indicia of reliability. Still, it is an assertion of several previous unlawful contacts with Davis and the statements were against the informant's penal interests, so they add at least something to the probable cause calculus.

Third, the task force had interacted with Davis about a month before, pulling him over in early January (in his girlfriend's car) and finding him in possession of $2000 cash. By itself, this information has meager value, but it does lend some support to the informant's account.

Fourth, the informant was able to contact Davis to set up a drug deal on February 13, and Davis did appear as promised. The informant's ability to interact with Davis in this fashion is another indicium that the informant's account that Davis is a drug dealer is credible. It's not much, but it's something.

Finally, and pointing the other direction, Davis did not bring an eight-ball of crack to the meeting like the informant said that Davis would. There are several logical explanations why this could be true, but Detective Wegner does not offer any of them in his affidavit. Because the state court issued the warrant, we probably may infer that the state court inferred an inculpatory reason for Davis showing up without the eightball; however, over-piling inferences in this fashion doesn't advance the probable cause analysis. After all, on these facts, another valid inference that the state court could have drawn (but apparently chose not to) is that Davis didn't bring an eightball of crack to the meeting was because he wasn't a drug dealer.

All things considered, the informant's information in the search warrant application is weak probable cause at best, insufficient to establish probable cause at worst. This is the type of situation in which the good faith doctrine is most directly applicable, as discussed later.

IV. Nexus Between Davis and Apt. 103

Davis contends that there was no probable cause to believe that the items to be seized pursuant to the warrant would be located at Apt. 103. Davis is correct. The Fourth Amendment's particularity clause requires the government to limit the scope of its searches to the places in which there is probable cause to believe that evidence may be found. *Maryland v.*

Garrison, 480 U.S. 79, 84 (1987). The "particular place" half of the equation often is overlooked, but it is important:

> The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.

U.S. v. Reddrick, 90 F.3d 1276, 1281 (7th Cir. 1996), *quoting Zurcher v. Stanford Daily*, 436 547, 556 (1978). It is up to the police to make a sufficient showing that the described items are to be found in a particular place. *United States v. Nafzger*, 965 F.2d 213, 214 (7th Cir. 1992).

Put another way, there is no probable cause to search a location absent information linking the illegal activity to the place to be searched. *See United States v. Johnson*, 289 F.3d at 1039, *citing United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000). Judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense. *United states v. Anderson*, 450 F.3d 294, 303 (7th Cir. 2006). In the case of drug dealers, evidence often is found at their residences. Id.

But in the instant case, as Davis points out, there is no evidence that Davis lived with his girlfriend, or that he even stayed with her. No one ever saw him go *into* the apartment. For all the police knew, he simply stopped by Henrich's place whenever he needed to borrow her car for an errand. Indeed, he might have had his own key to her car, eliminating the need even to go into her building.

Detective Wegner makes no claim, either in the boilerplate section of his affidavit, or in his report of Officer's Valenta's investigation of Davis, that there was any reason to believe that

drug dealers keep their drugs, money or guns at their girlfriend's houses, or that Davis was engaged in such behavior in this case. Therefore, the nexus evidence presented in support of the search warrant application, recited above, does not meet even the forgiving threshold of probable cause. So the question becomes whether it was so far below this threshold as to have made the task force's reliance on the warrant unreasonable.

V. The Good Faith Doctrine

In *United States v. Leon,* 468 U.S. 926 (1984) the Court held that:

> In a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.
>
> * * *
>
> We have . . . concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination. Deference to the magistrate, however, is not boundless.

Having so stated, the Court then held that

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Id. at 926.

Such determinations must be made on a case-by-case basis with suppression ordered "only in those unusual cases in which exclusion will further the purpose of the exclusionary

rule." 468 U.S. at 918. When the officer's reliance on the warrant is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule because it is

> painfully apparent that the officer is acting as a reasonable officer would and should act in similar circumstances. . . . This is particularly true . . . when an officer acting with objective good faith has obtained a search warrant from a judge . . . and acted within its scope. . . . Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the [court's] error rather than his own cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 920-21, internal quotations omitted.

The Court noted the types of circumstances that would tend to show a lack of objective good faith reliance on a warrant, including reliance on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or reliance on a warrant so facially deficient that the officer could not reasonably presume it to be valid. *Id*. at 923. The Court observed that "when officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *Id*. at 924. *See also Arizona v. Evans,* 514 U.S. 1, 11-12 (1995)(reaffirming the Supreme Court's reluctance to suppress evidence obtained in good faith but in violation of a defendant's Fourth Amendment rights).

Put another way, an officer's decision to obtain a warrant is *prima facie* evidence that he was acting in good faith, and it is the defendant's burden to demonstrate rebut this presumption. *Otero*, Slip Op. at 6-7, citing *United States v. Mykytiuk*, 402 F.3d 773, 777 (7th Cir. 2005).

Davis relies on the third prong of *Leon*, arguing that this warrant was so lacking in probable cause as to render the officers' reliance on the warrant "entirely unreasonable." *Otero*, Slip op. at 7. Davis cannot establish that task force agents could not have held an objectively reasonable belief that their informant was reliable. They had worked with him before and he had produced excellent results. He gave them some specifics about Davis that were believable, then he set up a deal for which Davis appeared, albeit without the drugs. Had the officers waited to arrest Davis until after he talked to the informant, they might have had a clearer idea why he didn't have an eightball of crack with him, but as mentioned above, there are some logical explanations for this that are not exculpatory. Since Detective Wegner didn't suggest any of these in his warrant application, the government cannot rely on them to establish probable cause, but it is fair and reasonable to conclude that the task force agents truly believed that they were dealing with a reliable informant.

It is a much closer call whether it was objectively reasonable for the agents to believe that Davis kept any contraband at Apt. 103. On this record, I conclude that it was not. Whatever else the task force agents might have known about Davis's connection to Apt. 103, they did not put any connecting information Detective Wegner's affidavit to the court. Maybe the agents didn't have anything else to offer, maybe they were just operating too quickly to prepare a thorough affidavit, but for *Leon* purposes, they are limited by what they presented to the court in the affidavit. And there's nothing there.

It is unreasonable to surmise that just because a woman lends her car to her boyfriend on a regular basis, the boyfriend probably keeps his stuff at her place, particularly illegal stuff like

crack or firearms. Everyone who owns a car has had occasion to lend it to a friend, neighbor, relative or inamorata, often more than once to the same person. Does this unadorned act of generosity even *suggest*–let alone create probable cause–that the borrower is caching contraband in the lender's residence? The question almost answers itself: this would be an illogical, unreasonable, near-Orwellian conclusion to draw. Does the answer change if we narrow the hypothetical to boyfriend/girlfriend? No, not without more information. Couples who are dating share a lot, but it is unreasonable to conclude, without corroboration, that just because the girlfriend shares her car with her beau, he stores his crack, cash and gats in her apartment. Therefore, notwithstanding the state court's issuance of a warrant in this case, it was objectively unreasonable for the task force agents to conclude that it was reasonable to conclude that Davis had contraband at Apt. 103.

Objectively unreasonable, but not subjectively unreasonable: experienced, aggressive narcotics agents usually have a good sense of what's actually happening in a drug-tinged situation, and it's not bad police work for them sometimes to take a flier and act on a gut feeling, particularly if they run it past a judge and the judge says yes. As the Court asked in *Leon*, what more is an officer supposed to do? But that's where "objectively reasonable" comes in. Acting swiftly following an arrest that didn't turn out as planned might compromise everybody's ability adequately to think through and reflect upon what's occurring and why. It's hard to fault these agents for seeking additional avenues by which to pursue stronger evidence against Davis.

But if the agents had thought through and reflected upon the paucity of their evidence connecting Davis to Apt. 103, they would have realized–should have realized–that they didn't

actually have enough. They cannot rely on the state court's imprimatur to salvage this well-intentioned but misdirected search warrant.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that:

(1) If this court determines that defendant Richard E. Davis has not established a reasonable expectation of privacy in the premises searched, then this court should deny his motion to quash the warrant and suppress evidence; but,

(1) If this court determines that defendant Richard E. Davis has established a reasonable expectation of privacy in the premises searched, then this court should grant his motion to quash the warrant and suppress evidence.

Entered this 27th day of July, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

July 30, 2007

Rita Rumbelow
Assistant United States Attorney
P.O. Box 1585
Madison, WI 53703-1585

Richard E. Davis
Dane County Jail
115 West Doty Street
Madison, WI 53703

David Mandell
Mandell, Ginsberg & Meier
P.O. Box 2095
Madison, WI 53703-2095

Re: United States v. Richard E. Davis
Case No. 07-CR-015-S

Dear Counsel and Mr. Davis:

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 newly-updated 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 August 6, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 6, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ Connie A. Korth
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable John C. Shabaz, District Judge