United States v. Trujillo

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MEMORANDUM AND ORDER

This case involving the illegal distribution of methamphetamine comes before the court on the following motions filed by the defendants: Defendant Robert Trujillo's motion to suppress (Dk. 111); Defendant Lemuz-Garcia's motion to suppress (Dk. 119); Defendant Alejandro Trujillo's motion to suppress search of his person (Dk. 121); Defendant Alejandro Trujillo's motion to suppress search of his residence (Dk.. 123); Defendant Robert Trujillo's motion for a bill of particulars (Dk. 100); Defendant Robert Trujillo's motion for severance (Dk. 101); and Defendant Alejandro Trujillo's motion in limine (Dk. 124). The court held an evidentiary hearing on May 26, 2004, heard the arguments of counsel, has reviewed the evidence and the pleadings, and is now ready to rule.

MOOT MOTIONS

The court has recently granted the government's motion to dismiss defendant Roberto Trujillo from this case. Accordingly, the court finds Roberto Trujillo's pending motions to be moot. These are his motion to suppress (Dk. 111), his motion for a bill of particulars (Dk. 100), and his motion for severance (Dk. 101).

MOTIONS TO SUPPRESS

Defendants have moved to suppress the searches of their respective residences, and defendant Alejandro Trujillo has additionally moved to suppress the search of his person. The court addresses this latter motion first.

Defendant Alejandro Trujillo's motion to suppress search of his person (Dk.121).

Defendant Alejandro Trujillo challenges the search of his person immediately after his arrest. Defendant alleges that this search was conducted pursuant to the search warrant of his residence, which warrant lacked probable cause. Dk. 121. The government counters that this defendant was arrested pursuant to an arrest warrant and that the ensuing search of his person was pursuant to his arrest.

In support of the government's contention that defendant was searched pursuant to a valid arrest, the government offered the testimony of Shawnee County Kansas Sheriff's Officer Danny Lotridge. He testified that he effected the arrest of defendant Alejandro Trujillo on September 11, 2003. At the

time of the arrest, Officer Lotridge had neither seen the arrest warrant for this defendant, nor knew of the specific crime for which defendant's arrest warrant had been issued. He had been told previously that day, however, by Deputy Chief Williams of the Emporia Police Department that an arrest warrant had been issued for Alejandro Trujillo. Officer Lotridge learned this while attending a briefing, along with many other law enforcement officers and agents, just prior to the execution of search warrants and arrest warrants throughout Emporia relating to the investigation of the sale of methamphetamine. The record before this court shows that a praecipe for warrant was filed as to this defendant on September 10, 2003, and his arrest warrant was issued that same day. Dk. 2.

Immediately after arresting this defendant, Officer Lotridge searched him for weapons. This is the officer's standard practice when arresting a person, whether the arrest is made pursuant to probable cause or pursuant to an arrest warrant. Officer Lotridge testified that at the time he searched this defendant, the search warrant for this defendant's residence had not yet been executed, and he had no knowledge of what was found in the search of this defendant's residence. No other testimony was presented.

It is thus undisputed that an arrest warrant issued for this defendant the day prior to his arrest. The court finds no reason to discredit the officer's testimony that he had been informed of the existence of the arrest warrant by his superior officer prior to defendant's arrest, and acted on the basis of that knowledge in effecting defendant's arrest. It is undisputed that the search of this defendant's person occurred immediately after his arrest and was prior to and independent of the search of his residence. The court finds that the officer's search of this defendant's person was incident to arrest and was not unlawful. See generally Rawlings v. Kentucky, 448 U.S. 98, 111 (1980).

Motions to Suppress Searches of Residences

Defendants contend that the search warrant affidavits lacked probable cause, raising claims of staleness, lack of nexus, and insufficient sources of information. Defendants additionally allege that no basis appears for issuance of a no-knock, nighttime warrant.

General Law

Probable cause

The reviewing court gives "great deference" to the issuing judge's determination of probable cause, for it is a determination based on common sense. United States v. Finnigin, 113 F.3d 1182, 1185 (10th Cir.1997). The issuing judge must make a practical, common-sense determination from the totality of the circumstances presented whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The issuing judge is expected to draw reasonable inferences from the affidavits. See United States v. Edmonson, 962 F.2d 1535, 1540 (10th Cir. 1992).

The reviewing court will uphold that determination if the supporting affidavits provide a substantial basis for finding that probable cause existed. Gates, 462 U.S. at 236, 103 S. Ct. 2317; Finnigin, 113 F.3d at 1185. "In applying the test enunciated in Gates, this Court has stated that the 'affidavit' should be considered in a common sense, non-technical manner ..." Edmonson, 962 F.2d at 1540 (quoting United States v. Massey, 687 F.2d 1348, 1355 (10th Cir. 1982) (citation omitted)).

"[P]robable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." Gates, 462 U.S. at 232, 103 S.Ct. 2317. The Supreme Court has found it sufficient to say that probable cause is more than a mere suspicion, but considerably less than what is necessary to convict someone. United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

United States v. Jackson, 199 F. Supp. 2d 1081, 1091 (D. Kan. 2002).

Nexus

Probable cause to search a location does not depend on direct evidence or personal knowledge that evidence or contraband is located there. United States v. Hargus, 128 F.3d 1358, 1362 (10th Cir. 1997),cert. denied, 523 U.S. 1079 (1998). The affidavit need not aver that criminal activity actually occurred in that location. See United States v. $149,442.43 in U.S. Currency, 965 F.2d 868, 874 (10th Cir. 1992). It is enough when the affidavit establishes a "nexus between the objects to be seized and the place to be searched" from which "a person of reasonable caution" would "believe that the articles sought would be found" there. Hargus, 128 F.3d at 1362. This nexus "may be established through ... normal inferences as to where the articles sought would be located." United States v. Freeman, 685 F.2d 942, 949 (5th Cir. 1982).

Staleness

Staleness is not determined merely by counting the number of days between the observations recorded in the affidavit and the application for a search warrant. As this court stated in United States v. Wright, 2001 WL 1159765, *2 (D. Kan. 2001):

"Probable cause to search cannot be based on stale information that no longer suggests that the items sought will be found in the place to be searched." United States v. Snow, 919 F.2d 1458, 1459 (10th Cir. 1990). The determination of timeliness, however, does not depend on simply the number of days that have elapsed between the facts relied on and the issuance of the warrant; instead, whether the information is too stale to establish probable cause depends on "the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." Snow, 919 F.2d at 1460 (quoting United States v. Shomo, 786 F.2d 981, 983 (10th Cir. 1986).

Where the offense in question is ongoing and continuing, the passage of time is not critically

important. United States v. Mathis, 357 F.3d 1200, 1207 (10th Cir. 2004).

Knock and Announce

The search in this case was executed by state officers acting on a warrant issued by a state court. Thus, the officers' entry was legal if it met the reasonableness standard under the Fourth Amendment. See United States v. Mitchell, 783 F.2d 971, 974 (10th Cir.),cert. denied, 479 U.S. 860 (1986). In order to satisfy this reasonableness standard, police officers executing a warrant generally must announce their authority and purpose before entering a dwelling. See id. at 974.

As both the Supreme Court and the Tenth Circuit have recognized, "[o]fficers may ... be excused from the usual 'knock and announce' rule if exigent circumstances attended the search." United States v. Moore, 91 F.3d 96, 98 (10th Cir. 1996). Exigent circumstances include "where there is a threat of physical violence or where evidence would be at risk of destruction in the event of an advertised entry." United States v. Watson, 61 Fed. Appx. 514, 519, 2003 WL 254311 (10th Cir. Feb. 5, 2003). See Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (exigent circumstances include those which would impede the officers' investigation). Hypothetical risk and generalized concerns are insufficient. Instead, the court requires a "determination in each case whether the facts and circumstances of the particular entry justified dispensing with the knock-and announce requirement." 520 U.S. at 394.

As this court stated in United States v. Culpepper, 2003 WL 22801867, *2 (D. Kan. 2003):

In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard--as opposed to a probable-cause requirement--strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. Richards, 520 U.S. at 394 (finding that officers had a reasonable suspicion that defendant might destroy evidence if given further opportunity to do so, based upon his apparent recognition of the officers combined with the easily disposable nature of the drugs .)

Where a judge issues a no-knock search warrant, "that judge must determine whether the affidavit supporting the warrant request sufficiently describes exigent circumstances that would justify a no-knock warrant. See United States v. Thigpen, No. 91- 1128, 1992 WL 252453, at *3 (10th Cir. Sept. 29, 1992); accord Richards, 520 U.S. at 396 n. 7". United States v. Winters, 2001 WL 670924, *7 (D. Utah 2001). "In reviewing a challenge to the no-knock or nighttime execution of a search warrant, we review the execution from the perspective of reasonable officers who are legitimately concerned not only with doing their job, but with their own safety. United States v. Myers, 106 F.3d 936, 940 (10th Cir. 1997)." United States v. Colonna, 360 F.3d 1169, 1176, 2004 WL 233297 (10th Cir. Feb. 9, 2004).The court must look at the totality of circumstances in determining whether a no-knock or nighttime

execution is reasonable. Id.

Analysis

Probable cause

The affidavits in support of the search warrants were apparently taken from a master affidavit. They contain many paragraphs and pages that are identical, and a few paragraphs which are distinct. The primary target of the law enforcement operation on the night in question appears to be Alejandro Trujillo.

The facts recited in the affidavit in support of the search warrant for Alejandro Trujillo include the following: 1) he was named as a source of illegal narcotics by two different individuals arrested in other drug cases; 2) he spoke with a "cooperating individual" on the telephone several times to set up drug deals; 3) he met with the "cooperating individual" in Topeka on Aug. 12, 2003, took $5,000 from him, and said he would return on Aug. 14, 2003 with methamphetamine and to collect additional money; 4) he picked up $15,000 on Aug. 19, 2003, from a three-pound drug transaction that occurred the previous day; and 5) he received $12,500 for one and one-half pounds of methamphetamine which he delivered or assisted in delivering on Aug. 29, 2003.

These facts raise a fair probability that contraband or evidence of a crime would be found in a defendant Alejandro Trujillo's residence. Although no drug transactions were stated to have occurred in or near his residence,the nexus between the objects to be seized and the place to be searched can be established through normal inferences as to where the articles sought would be located. Here, "a person of reasonable caution" could believe that the articles sought, which include not only drug paraphernalia and illegal contraband, but also books, records, receipts, notes, and other indicia of financial transactions, would be found in this defendant's residence. The events recited are not so remote in time, given their nature, as to be stale. Probable cause is sufficient.

The facts as to defendant Lemuz-Garcia are scant. The affidavit does not name this defendant, but recites two events occurring at his residence: 1) Alejandro Trujillo picked up a female passenger from that location on 8-14-03; and 2) Alejandro Trujillo drove another individual to that location on 8-19-03; once there, the other individual exited the vehicle and entered Lemuz-Garcia's residence, carrying the white shopping bag which contained the buy money from the controlled delivery by the cooperating individual.

The first item adds nothing except to show that Alejandro Trujillo visited Lemuz-Garcia's residence more than once. The second is more substantial in nature. Although the affidavit does not state whether the unnamed individual left Lemuz-Garcia's residence on the date in question with or without the buy money, it is reasonable to infer that he took the buy money into that residence for some reason connected to the money or the drug transaction, rather than not. These facts show a

direct connection linking this defendant's home to the suspected criminal activity. See United States v. Rowland, 145 F.3d 1194, 1204 (10th Cir. 1998). This direct connection between the allegedly criminal acts and Lemuz-Garcia's residence is sufficient to show a nexus and warrant issuance of the search warrant for that location. See United States v. Harris, __ F.3d __, 2004 WL 1194735, *7 (10th Cir. June 1, 2004) (finding probable cause based in part on affidavit's statement of a controlled delivery to defendant's apartment complex). The court additionally rejects the assertion that this information is stale,[1] because the events stated in the affidavit are simply not that old and the offense in question is ongoing and continuing, rendering the passage of time less important. See Mathis, 357 F.3d at 1207.

No-knock service

The exigent circumstances described in the affidavit regarding Alejandro Trujillo include both officer safety and destruction of evidence. Specifically, they are: 1) defendant was a suspect in numerous disorderly conduct cases and in an aggravated assault and an aggravated battery case; 2) defendant was known by Emporia Police Department officers to be "non-cooperative and belligerent with law enforcement"; 3) defendant had numerous firearms within his residence and some in his vehicle[2] ; and 4) methamphetamine, when sold in small quantities can be easily destroyed. Gvmt. Exh. 2, p. 8. The affidavit additionally states facts from which it would be reasonable to infer that this defendant was dealing in small quantities of methamphetamine. See id (p. 3, stating defendant was to collect a total of $10,000 for an amount of methamphetamine; p. 5, stating defendant engaged in a three-pound drug transaction on 8-18-03; p, 8, stating that the methamphetamine was twice delivered by taking it out of a cooler located in the back of a vehicle.)

The court finds that as to defendant Alejandro Trujillo, the statements in the affidavit are sufficient to raise an officer's reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or would inhibit the effective investigation of the crime.

The court admits that the basis for issuance of a no-knock, nighttime warrant as to defendant Lemuz-Garcia is more questionable. The recitations in support of the no-knock application in the affidavit supporting the search warrant for defendant Lemuz-Garcia are identical to those in the affidavit regarding defendant Alejandro Trujillo. The affidavit recites facts about Alejandro Trujillo's arrests, reputation among local law enforcement officers, and possession of firearms, but no facts specific to defendant Lemuz-Garcia relating to exigency.

The sole justification, if any, for issuance of a no-knock warrant for this defendant is the recitation that small amounts of methamphetamine can easily be destroyed, a showing that the defendants were involved in a conspiracy to distribute methamphetamine and a showing that defendant Lemuz-Garcia's residence was a stash house. This may or may not be sufficient. See Colonna, 360 F.3d 1169, citing United States v. Jenkins, 175 F.3d 1208, 1214 (10th Cir.) ("The mere likelihood that

drugs or weapons will be found at a particular premises does not justify a no-knock or nighttime execution of a search warrant."), cert. denied, 528 U.S. 913 (1999). The court thus examines the government's assertion that the search is saved by the Leon good faith exception.

Leon good faith exception

Regardless of the all the rulings above, the court finds in the alternative that the officers executing the warrant acted in good faith and with objectively reasonable reliance on the search warrants.

Exclusion of evidence is not appropriate where the officers acted in good faith in executing the warrant. See generally United States v. Leon, 468 U.S. 897, 913 (1984). There is a presumption that when an officer acts upon a search warrant the officer is acting in good faith.United States v. McKneely, 6 F.3d 1447, 1454 (10th Cir. 1993). "This presumption, though not absolute, must carry some weight." Id. (internal quotation omitted).

The Leon good faith exception to the probable cause requirement does not apply in the following circumstances: 1) where the issuing judge was misled by false information which was knowingly or recklessly placed in the affidavit; 2) where the issuing judge "wholly abandoned his judicial role"; 3) where the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and 4) where the warrant was "so facially deficient ... that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923 (citations omitted).

In contending that Leon cannot save the warrant, defendants rely upon the third and fourth of these exceptions- no indicia of probable cause, and facial deficiency. Defendants do not allege, however, that the warrant is facially deficient in any manner other than its failure to show probable cause. Compare Leon, 468 U.S. at 923 (noting, as examples of facial deficiency, a failure to particularize the place to be searched or the things to be seized). Thus the court shall analyze solely the third exception.

The court admits the possibility that reasonable legal minds could differ regarding the legal sufficiency of probable cause and exigent circumstances in the affidavits. See e.g., United States v. Trujillo, 2004 WL 813645, *6 (D. Kan. 2004) (granting motion to suppress based on similar affidavit and warrant issued for Roberto Trujillo, Sr.). But the relevant inquiry is whether the underlying documents are devoid of factual support, not merely whether the facts they contain are legally sufficient. The court cannot say that a reasonably well-trained officer would have known that any of the searches was illegal despite the magistrate's authorization.

"Because the good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization, the reviewing court must examine the text of the warrant and the affidavit to ascertain whether the agents might have reasonably presume[d] it to be valid." United States v. McKneely, 6

F.3d 1447, 1454 (10th Cir.1993) (internal quotations omitted). "[W]hen reviewing an officer's reliance upon a warrant, we must determine whether the underlying documents are devoid of factual support, not merely whether the facts they contain are legally sufficient." Id. (internal quotation omitted). "[T]he knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers." United States v. Bishop, 890 F.2d 212, 217 (10th Cir. 1989).

United States v. Martinez-Martinez, 25 Fed.Appx. 733, 736, 2001 WL 1241303, *3 (10th Cir. 2001).

Given the strong presumption in favor of warrant searches, the "great deference" accorded to a magistrate's probable cause determination, and the fact that the warrant affidavit contained sufficient facts to establish at least a reasonable suspicion of criminal activity and exigent circumstances, the court holds that reasonable officers would have assumed each of the search warrants to be valid.

Although the good faith exception does not apply to the improper execution of a warrant, see United States v. Medlin, 798 F.2d 407, 410 (10th Cir. 1986), it does apply where the execution was in accordance with the terms of the warrant. Id. Here, each warrant specifically authorized both no-knock service, and nighttime service. Excluding evidence seized by police in good faith reliance on a facially valid warrant would not deter misconduct, which is the aim of the exclusionary rule. Medlin, 798 F.2d at 409 (citing Leon, 468 U.S. at 916-22). Accordingly, defendants' motions to suppress the searches of their residences shall be denied.

Excessive force in execution of warrant

Defendant Allejandro Trujillo further contends that even if the no-knock warrant was properly issued, the forceful manner in which it was executed (by breaking down an unlocked door and using flashbombs), was itself unreasonable. The court recognizes that excessive or unnecessary property destruction during a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression. See United States v. Ramirez, 523 U.S. 65, 66 (1998).

The government concedes that it executed the warrants at nighttime and without knocking, but no further facts have been established. Because no evidence supports the allegations that officers broke down an unlocked door or used flashbombs in the execution of the warrant, the court need not examine whether such acts, under the circumstances of this case, were unreasonable.

MOTION IN LIMINE (Dk. 124).

Defendant Alejandro Trujillo has filed a motion in limine asking the court to prevent the government from making "Mafia"-type references to defendants at trial, such as "the Trujillo

family." The court takes this motion under advisement and will decide it at a date closer to trial.

IT IS THEREFORE ORDERED that defendant Roberto Trujillo's motion to suppress (Dk. 111), his motion for a bill of particulars (Dk. 100), and his motion for severance (Dk. 101), are denied as moot.

IT IS FURTHER ORDERED that defendant Lemuz-Garcia's motion to suppress (Dk. 119) is denied; that defendant Alejandro Trujillo's motion to suppress search of his person (Dk. 121) is denied; and that defendant Alejandro Trujillo's motion to suppress search of his residence (Dk. 123) is denied.

IT IS FURTHER ORDERED that defendant Alejandro Trujillo's motion in limine (Dk. 124) is taken under advisement until a date closer to trial.

Dated this 30th day of June, 2004, Topeka, Kansas.

Sam A. Crow, U.S. District Senior Judge

1. . Defendant's claim of staleness includes his assertion that 43 days passed between August 19th and Sept. 10th, when the warrant was issued. Even if defendant's math were correct, such information is not sufficiently remote in time to be stale. See Harris, 2004 WL 1194735 at *6 (finding events that occurred in January, February, March, and July of 2002 "refreshed" the allegedly "stale" information in August, 2002 search warrant affidavit.)

2. . The government asserts that officers saw the guns placed in this defendant's vehicle just two days before the search warrant application, but no facts were introduced to support this assertion.