

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
DEJAY MONSON,)
)
Defendant.)
)

CASE NO. 8:08CR388

**BRIEF IN SUPPORT OF
MOTION TO SUPPRESS**

The Defendant, Dejay Monson, submits the following brief in support of his motion to suppress evidence.

FACTS

Dejay Monson has been indicted for manufacturing 100 kilograms or more of marijuana, possession with intent to distribute 100 kilograms or more of marijuana, and user in possession of a firearm. The government’s physical evidence was derived from an anticipatory search warrant executed at Monson’s property on September 16, 2008. The affidavit for the search warrant was based solely on information obtained from an “unwitting” confidential informant (CI).

When officers arrived at Monson’s property to execute the warrant, they took Monson into custody and attempted to question him about their investigation. As Monson was being advised of his Miranda rights, he unequivocally requested an attorney. Rather than ending the interview until Monson was provided an attorney, an officer proceeded to interrogate Monson for nearly an hour. Monson’s statements must be suppressed because they were the product of a Miranda violation. Monson’s statements must also be suppressed because

they were involuntary and obtained in a manner that violated his rights under the Fifth Amendment to the United States Constitution.

ARGUMENT

I. ALL EVIDENCE OBTAINED IN THE SEARCH OF MONSON’S PROPERTY, INCLUDING MONSON’S STATEMENTS, MUST BE SUPPRESSED BECAUSE THE WARRANT AUTHORIZING THE SEARCH WAS NOT SUPPORTED BY PROBABLE CAUSE.

All evidence seized as a result of the search warrant, including Monson’s statements to law enforcement, must be suppressed as fruit of an unconstitutional search. The Fourth Amendment to the United States Constitution guarantees that:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized.

U.S. CONST. AMEND. IV.

The standard for determining probable cause is well defined. Probable cause exists when “there are sufficient facts to justify the belief by a prudent person that contraband or evidence of crime will be found in the place to be searched.” United States v. Gladney, 48 F.3d 309, 312 (8th Cir. 1995). Probable cause is assessed under the “totality of the circumstances” test. Illinois v. Gates, 462 U.S. 213 (1983). In cases where the issuance of the search warrant is based solely upon an affidavit, only information within the four corners of the affidavit may be considered in determining the existence of probable cause. Gladney, 48 F.3d at 312. Thus, the issue for this Court’s determination is whether the affidavit herein was sufficient under this standard. The Defendant asserts that it was not.

Obviously, informant information is commonly used by law enforcement in obtaining search warrants. Although common place, the use of informant information in search warrants is not without legal limitations. Where, as here, the affidavit relies exclusively upon the representations of an informant, “the basis of the informant’s knowledge and the informant’s credibility or reliability” are particularly relevant to the court’s determination. United States v. Hyten, 5 F.3d 1154, 1156 (8th Cir. 1993). See also United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993) (“the core question in assessing probable cause based upon information supplied by an informant is whether the information is reliable”). The Eighth Circuit has stated that “[i]nformation may be sufficiently reliable to support a probable cause finding if the person providing the information has a track record of supplying reliable information, or if it is corroborated by independent evidence.” Williams, 10 F.3d at 593, citing Draper v. United States, 358 U.S. 307, 313 (1959). In making a determination of probable cause, the issuing judge must be presented with sufficient information so that the judge may make an independent determination. The judge’s action cannot be a mere ratification of the bare conclusions of others. Illinois v. Gates, 462 U.S. 213 (1983).

Under these standards, the affidavit in this case failed to set forth sufficient facts to justify reliance upon this CI’s information. As United States v. Wilhelm, 80 F.3d 116 (8th Cir. 1996), and any number of other Eighth Circuit cases make clear, what a search warrant affidavit shows the issuing judge about the informant’s reliability and veracity is critical. In this case, the affidavit made no attempt to state facts which establish the veracity or reliability of the informant. Such information could not have been included because the CI had absolutely no previous track record of reliability with law enforcement. As a result, law

enforcement did not even attempt to hold the CI out as a previously proven informant. Quite to the contrary, the affidavit referred to the CI as “unwitting” and admitted that no prior relationship existed.

While this was obviously not a case of a proven informant, it also was not a case where law enforcement presented sufficient corroboration of the CI’s allegations. Upon learning from the CI that Monson allegedly possessed stolen weapons that he would sell or trade for marijuana, the police did nothing to corroborate any of the information.

According to the affidavit, Detective Nelson accompanied the CI to Monson’s residence. The CI informed Detective Nelson that Monson would sell him two firearms for \$1600. Detective Nelson and the CI did not have enough cash to purchase the firearms, so they left. No marijuana was sold or purchased, and there was no evidence that the firearms Monson allegedly offered to sell the CI were stolen or illegal. In other words, no information was discovered to corroborate either the CI’s belief that Monson would sell or trade stolen weapons or trade weapons for marijuana. No information was discovered to corroborate Detective Nelson’s bare conclusions that some of Monson’s firearms were stolen.

No other information was presented to the judge that would tend to corroborate the substance of the CI’s information. In fact, the affidavit contained no statements indicating that the CI’s information had been either investigated or corroborated. Particularly in the absence of an established track record with an informant, corroboration is virtually the only way for an issuing court to have any confidence in the informant’s information. See *generally Draper*, 358 U.S. 307 (1959).

The officers' failure to verify the CI's information, coupled with the lack of evidence of the CI's reliability, are fatal to the validity of the search warrant. Because the search of Monson's property was illegal, any evidence derived directly or indirectly from that search is inadmissible. Accordingly, the evidence seized from the property and Monson's statements must be suppressed.

II. THE AFFIDAVIT SUBMITTED IN SUPPORT OF THE SEARCH WARRANT WAS SO LACKING IN PROBABLE CAUSE AS TO RENDER GOOD FAITH BELIEF IN ITS VALIDITY ENTIRELY UNREASONABLE.

The Defendant acknowledges that even where a search warrant is found to lack facial validity under the probable cause standard, the officers' good faith reliance on the issuance of the warrant may still bar application of the exclusionary rule. United States v. Leon, 468 U.S. 897 (1984). However, the so-called "good faith" exception to the exclusionary rule is not limitless. As the Supreme Court has recognized, the "good faith" rule does not apply when (1) the information supporting the warrant contained so few indicia of probable cause as to render belief in its existence unreasonable; or (2) the warrant itself is so facially deficient that "no executing officer could reasonably presume it to be valid." Leon, 468 U.S. at 923. Both of these circumstances are present here.

As explained above, the information supporting the search warrant was wholly lacking in indicia of probable cause. It contained no information about the CI's reliability (because none existed), and no indication that the information provided by the CI had been corroborated. Given the lack of reliable information contained in the affidavit, no reasonable officer could presume that the warrant established the requisite probable cause for a constitutional search. Law enforcement is held to an objective standard and cannot excuse

facially insufficient search warrant applications with blanket claims of good faith. The use of informants in search warrant applications is sufficiently common place, and the applicable law sufficiently well-known, that the failure to corroborate an otherwise unproven informant should defeat any claims of good faith. See, United States v. Herron, 215 F.3d 812 (8th Cir. 2000). Accordingly, the Leon doctrine does not excuse the lack of probable cause in this case.

III. THE EVIDENCE MUST BE SUPPRESSED BECAUSE THE ANTICIPATORY SEARCH WARRANT DID NOT CONDITION THE SEARCH UPON THE DELIVERY OF CONTRABAND.

“An anticipatory warrant, by definition, is a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises; if those events do not transpire, the warrant is void.” United States v. Bosch, 2007 U.S. Dist. LEXIS 11948 at *45 (E.D. Mo. 2007), citing United States v. Garcia, 882 F.2d 699 (2nd Cir. 1989). The Eighth Circuit has stated that an “anticipatory search warrant should be upheld if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned upon that delivery.” United States v. Bieri, 211 F.3d 811, 814 (8th Cir. 1994), citing United States v. Tagbering, 985 F.2d 946, 950 n.6 (8th Cir. 1993).

As explained above, the affidavit did not contain sufficient probable cause that a delivery of contraband was likely to occur at Monson’s residence to justify the issuance of a warrant, and Leon does not excuse the lack of probable cause. In addition, the warrant contains another fatal flaw: it is an anticipatory search warrant that does not condition the search upon the delivery of contraband. The warrant did not contain *any* language directing the officers to execute the warrant only if the delivery of contraband occurred. Rather, the

warrant gave the officers authority to search Monson's property regardless of whether any delivery of contraband actually occurred. Moreover, the affidavit did not state that the warrant would only be executed upon delivery of contraband. See Tagbering, 985 F.2d at 950 (condition need not be written into the warrant itself if the affidavit represents to the issuing judge that the warrant will not be executed until the contraband is delivered). Due to the complete absence of anticipatory language in the affidavit or the warrant, all evidence obtained as a result of the search must be suppressed.

IV. MONSON'S STATEMENTS MUST BE SUPPRESSED BECAUSE HE DID NOT VOLUNTARILY WAIVE HIS MIRANDA RIGHTS, AND OFFICERS CONTINUED TO QUESTION HIM DESPITE HIS REQUEST FOR AN ATTORNEY.

Individuals subject to custodial interrogation by law enforcement officers must be advised of their right to remain silent, that any statements may be used as evidence against them, and that they have the right to have an attorney present during the questioning. Miranda v. Arizona, 384 U.S. 436 (1966). All statements obtained in violation of this rule are inadmissible against a defendant in a criminal trial. Id. at 492. Although a defendant may waive these rights, the government is held to a high level of proof that a waiver has been voluntarily effectuated. Specifically, the government must prove, taking into account the background, experience, and conduct of the defendant, that the waiver "was voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception" and was made with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). "Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension

may a court properly conclude that the Miranda rights have been waived.” Id., citing Fare v. Michael C., 442 U.S. 707, 725 (1979).

An evidentiary hearing is necessary to review the facts and to place the government to its burden of proof. Upon hearing in this matter, the evidence will show that Monson did not waive his Miranda rights. He requested an attorney at the time he was advised of his Fifth Amendment right to have one present during questioning. Deputy Keatts ignored his request and continued his interrogation. No principled argument can be made that Monson waived his Miranda rights by answering Deputy Keats questions. Accordingly, Monson’s statements must be suppressed.

V. MONSON’S STATEMENTS MUST BE SUPPRESSED BECAUSE THEY WERE INVOLUNTARY, AND THUS OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS.

The Fifth Amendment to the United States Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” Accordingly, a confession is admissible in evidence only if it is voluntarily given. 18 U.S.C. § 3501(a). The Eighth Circuit has held:

A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant’s will and critically impair his capacity for self-determination. Simmons v. Bauer Sox, 235 F.3d 1124, 1132 (8th Cir. 2001) *cert denied*, 534 U.S. 924 (2001). Whether a confession is involuntary is judged by the totality of the circumstances. See Wilson v. Lawrence County, 260 F.3d 946, 952 (8th Cir. 2001). The court must look at the “conduct of the officers and the characteristics of the accused.” See Id. The government bears the burden of persuasion and must prove by a preponderance of the evidence that the challenged statements were voluntary. See United States v. Astello, 241 F.3d 965, 966 (8th Cir.), *cert denied* 533 U.S. 962 (2001).

United States v. Lebrun, 363 F.3d 715 (8th Cir. 2004). In this case, the officers engaged in activity that was clearly designed to overbear Monson's will and extract incriminating statements from him. This included but was not limited to making express promises to Monson that he would benefit if he cooperated in their investigation. Given the totality of the circumstances, Monson's statements were clearly not voluntary.

18 U.S.C. § 3501(b) sets forth additional factors to be considered in determining whether a confession was voluntary:

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment; (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession; (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement can be used against him; (4) whether or not such defendant had been advised prior to questioning of his right to assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(b). In determining whether an alleged confession is voluntary, the Court should consider all of the circumstances surrounding the giving of the confession, including those factors specifically listed in 18 U.S.C. § 3501(b). United States v. Casal, 915 F.2d 1225, 1228 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1400 (1991).

The precise circumstances of Monson's statements can only be fully explored and developed in the course of the requested evidentiary hearing. The evidence adduced at the

hearing will show that officers violated Monson's right to due process under the Fifth Amendment. His statements should accordingly be suppressed.

CONCLUSION

Based on the foregoing, the Defendant submits that there are factual and legal issues herein which can be developed only in the context of an evidentiary hearing and that on such basis his request for an evidentiary hearing should be granted. Upon hearing in this matter, the Court should grant the Defendant's motion to suppress.

Respectfully submitted,

DEJAY MONSON, Defendant,

By: s/ Michael F. Maloney

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following: Kim Bunjer, Assistant United States Attorney, Omaha, NE.

s/ Michael F. Maloney