

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL
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HAROLD BALLOU, JR. and : :
MICHAEL SAVARESE : NO. 03-187-1 & 2

MEMORANDUM

McLaughlin, J.

November 12, 2003

Harold Ballou, Jr., who is charged with attempt to manufacture methamphetamine, possession of pseudoephedrine, and possession of a three-necked round bottom flask, knowing and having reasonable cause to believe it would be used to manufacture methamphetamine, moved to suppress physical evidence seized during a search of his residence, his car, and a storage locker he shared with his business partner.

Michael Savarese, who is charged with attempt to manufacture methamphetamine, and possession of pseudoephedrine, moved to suppress his statements to law enforcement agents and evidence seized during a search of his car.

The Court held evidentiary hearings on both motions on September 29, 2003, and October 30, 2003, and entered an Order denying both motions on November 4, 2003. This memorandum sets

forth the Court's Findings of Facts and Conclusions of Law regarding the motions.

I. Findings of Fact

A. Mr. Ballou's Motion to Suppress

On November 5, 2001, Detective Scott Errington of the Berks County District Attorney's Office, Narcotics Unit received information from a confidential source that the defendant, Harold Ballou, Jr., was purchasing cold products containing quantities of ephedrine or pseudoephedrine and that he was using these cold products to make methamphetamine. Detective Errington was also told that Mr. Ballou was going to retail stores such as Walmart and Kmart to purchase small quantities of these decongestant products. Mr. Ballou would do this several times during the week to avoid alerting authorities. The informant told Detective Errington that Mr. Ballou would go to his father's house where the source believed he was manufacturing the methamphetamine.

Detective Errington conducted an independent investigation to corroborate the information he received from the confidential source. He learned that Harold Ballou lived at 202 Cameron Drive in Douglassville, Pennsylvania through Berks County tax records and through surveillance. He drove by the residence and obtained tags from the vehicles at that address that he determined belonged to Harold and/or Michelle Ballou.

As part of the investigation, he did several "trash pulls" at the Cameron drive residence. Detective Errington did a trash pull on November 13, 2001, during which he seized several boxes of Equate brand pseudoephedrine. Equate brand is a generic decongestant product sold by Walmart. Each box was empty but was packaged for 96 tablets of pseudoephedrine. The empty boxes of pseudoephedrine were not stamped so that you could not tell from the boxes when they were purchased. He also seized two syringes and articles of mail in the name of Harold and Michelle Ballou. Detective Errington field tested the liquid in the syringes and received a positive reaction for amphetamines. Amphetamine is not an ingredient of methamphetamine. One minor mistake in the process of cooking the methamphetamine can produce amphetamine.

Detective Errington spoke with Paul Geip of the Pennsylvania State Police clandestine laboratory team who confirmed that the ephedrine contained in these products was a precursor chemical necessary to produce methamphetamine. Mr. Geip advised Detective Errington that an ounce of methamphetamine could be manufactured from the nine empty boxes found in the trash.

Detective Errington conducted a trash pull on November 20, 2001. He seized numerous latex gloves, that appeared to be used. Latex gloves are used to protect your hands when manufacturing methamphetamine. The gloves seized on November

20th were not tested to determine whether there were any traces of methamphetamine on them.

Detective Errington conducted a trash pull on December 4, 2001, at which time he seized an empty one-gallon can of acetone. Acetone or other similar type solvents is used in the process of extracting the actual ephedrine or pseudoephedrine from the cold tablets.

There was a trash pull on December 11, 2001. At that time, Detective Errington seized a receipt from a CVS pharmacy in Pottstown, Montgomery County, for four boxes of a decongestant product that was purchased on November 27th at approximately 2:30 a.m. Later on December 11, Detective Errington met with the manager at the CVS store and showed him the receipt. The manager identified the product purchased as CVS brand of pseudoephedrine, each box containing 96 tablets, with 30 milligrams each of pseudoephedrine. The police obtained a video tape from CVS pharmacy for November 27th. Detective Errington reviewed the tape and he could not identify Mr. Ballou as the person on the tape.

On January 11, 2002, Detective Errington and several other detectives began surveillance on Mr. Ballou's residence at 202 Cameron Drive. Shortly after 9:30 p.m., Mr. Ballou and another individual who was later identified as Thomas O'Donnell left in Mr. Ballou's vehicle. The police followed Mr. Ballou to

a Walmart store in Exeter Township in Berks County. Detective Errington and another detective went into the store. They observed Mr. O'Donnell and Mr. Ballou split up as they entered the store. They both proceeded to the pharmaceutical area where they each picked up three boxes of Equate brand Pseudoephedrine. They then went to separate registers that were seven or eight registers apart and checked out. They then returned to Mr. Ballou's residence on Cameron Drive.

Shortly thereafter, Mr. O'Donnell left the Cameron Drive residence. Detective Errington and another detective followed Mr. O'Donnell to a gas station on Route 422. Three to four minutes after Mr. O'Donnell left, Mr. Ballou left his residence. He was followed by surveillance officers. Mr. Ballou went in the direction of the gas station and the vehicles met up and followed each other down Route 422 to a Walmart store in Pottstown, Montgomery County. Detective Errington and another detective got out on foot and attempted to follow them into the store. By the time the police got to the store, Mr. Ballou and Mr. O'Donnell came out; each was carrying a bag. Each man went to his own vehicle. They met briefly in front of Mr. Ballou's vehicle and then departed separately.

Mr. Ballou then went to his father's residence on Pulaski Drive in West Pottsgrove Township, Montgomery County. He stayed at that location for ten or fifteen minutes. He departed

again and the surveillance team followed him back to his residence on 202 Cameron Drive.

On January 12, 2002, at 5:00 a.m., Detective Errington sought a search warrant from a District Justice in Berks County for Mr. Ballou's residence. Detective Errington executed the search warrant at the Ballou residence on Saturday, January 12, 2002 at approximately 6:05 a.m.

At the same time that the search was conducted at Mr. Ballou's house, there was a search conducted at Mr. Ballou's father's house. Nothing was seized during the search of Mr. Ballou's father's house. There was no evidence of any manufactured methamphetamine at that location. While Detective Errington was still at Mr. Ballou's residence, he was notified about the results of the search of the father's house.

During the execution of the warrant on Mr. Ballou's residence, the police seized numerous pseudoephedrine tablets that had been already removed from their packaging and were in a one gallon ziploc bag; numerous empty boxes of pseudoephedrine tablets from Mr. Ballou's bedroom and garage; acetone and denatured alcohol; a computer; chemistry books; and a small amount of cocaine from Mr. Ballou's bedroom. There were also numerous small plastic baggies that in the officers experience are used for re-packaging controlled substances. The baggies were an inch to an inch and a half. There was no presence of any

methamphetamine at the residence. There was no evidence of any methamphetamine being manufactured in the residence.

Detective Errington interviewed Mrs. Ballou during the search of her residence, sometime between 6:30 a.m. and 7:00 a.m. She told the police that she knew that her husband was involved in purchasing pseudoephedrine products and that he was purchasing them for the purpose of converting them to methamphetamine. She told the police that she believed that her husband had a methamphetamine lab but was not sure where it was. She also told the police that he possibly was storing the equipment in a storage locker at a storage facility across from Wawa. Detective Errington knew that Amity Self Storage was at that location.

Detective Walt Winnaker and Amity Township Police Officer Chad Knorr went to the Amity Storage facility and met with the manager. They determined that Mr. Ballou and a Mr. Robert Wiggins were leasing a storage locker jointly. The police then contacted Mr. Wiggins and Mr. Wiggins met the police at the manager's office of the storage facility. Mr. Wiggins consented in writing to a search of the storage locker.

There was a key ring seized that had the keys to Mr. Ballou's Jeep on it and also a key stamped 76. Detective Errington is not sure when he found the key. He may have seen it earlier and did not realize it was pertinent until Detective Winnaker told him that Mr. Ballou leased storage locker number

76. At that time, he started checking key rings and found the keyring with the stamp number 76 on it. The key was found on the kitchen counter. The affidavit of probable cause for the arrest says that it was found in the bedroom.

Detective Errington learned that Mr. Wiggins had consented to the search of the storage locker. He then had a discussion with Mr. Ballou and his attorney, Jeff Carver, who had come to the house during the search. Mr. Carver approached Detective Errington and asked him what cooperation the detective wanted from his client. Detective Errington told Mr. Carver that they were looking for consent from Mr. Ballou to search the storage locker and they wanted to know if there was anything dangerous in the storage locker that they had to worry about such as dangerous chemicals or any kind of booby traps. Mr. Carver then said: "All right, let me talk to him for a second." Mr. Carver then went into the room for a private conversation with Mr. Ballou.

Mr. Carver returned to the living room area and said that the detective could ask Mr. Ballou about the consent, that he was willing to give his consent, and that there was nothing dangerous in the locker. Detective Errington then asked Mr. Ballou in the presence of his counsel if there was anything dangerous in the storage locker that the officers had to worry about. Mr. Ballou said that there was not. Detective Errington

asked Mr. Ballou if he was giving consent for the search of the storage locker and Mr. Ballou said yes.

Mr. Wiggins told the police that the cleaning equipment in the locker belonged to both him and Mr. Ballou as they were partners in a cleaning business. The cleaning equipment was on the left side of the storage locker. Mr. Wiggins told the police that the items on the right side of the storage area belonged only to Mr. Ballou. Before entering the storage locker, the police observed several boxes on the right-hand side of the storage locker separated from everything else. They walked in, lifted the lid up a little bit, and saw glassware and unknown chemicals. They backed out and waited for the clandestine laboratory team. The search of the locker was conducted by a clandestine laboratory team. Various items were seized from the storage locker.

Nothing relevant to the investigation was seized from Mr. Ballou's blue Mustang.

B. Mr. Savarese's Motion to Suppress

Mr. Savarese arrived at Mr. Ballou's residence during the search at approximately 7:30 or 8:00 a.m. There were several unmarked police vehicles and a marked Amity Township patrol car in front of the residence. DEA agents were present. Everyone on the scene was wearing identification jackets. DEA had raid

shirts on that said DEA on one side and police on the other. Detective Errington and his group also had shirts that said police on them.

Mr. Savarese parked in the driveway, came to the front door carrying a grocery bag with eggs and orange juice in it, and knocked on the front door. The door was answered by police officers. Mr. Savarese was turned away and he started to walk back to the driveway. Special Agent Sean Yauger and Special Agent James Farano of the DEA followed Mr. Savarese from the residence toward the driveway. Special Agent Farano said something like "excuse me, sir" to get Mr. Savarese's attention. Mr. Savarese stopped and Special Agent Yauger asked Mr. Savarese for identification; Mr. Savarese produced a driver's license. Mr. Savarese said that he was carrying a basket of breakfast items to his friend.

Special Agent Farano went into the house to get Detective Errington. In the initial information that Detective Errington received from a confidential source, he was told that Mr. Savarese was involved in the methamphetamine operation. Detective Errington came out to talk to Mr. Savarese. Mr. Savarese told Detective Errington that he was there to visit Mr. Ballou and that he was concerned about what was going on in the residence. Detective Errington told Mr. Savarese that he could not tell him anything at that time and that he was not allowed

into the residence. Detective Errington told Mr. Savarese that there was nothing he could do and that he should leave.

Detective Errington told Special Agents Yauger and Farano that Mr. Savarese's name had come up during the initial part of the investigation.

Mr. Savarese did not leave but stayed in the driveway. Special Agents Yauger and Farano walked with Mr. Savarese to the driveway area of the residence. Mr. Savarese's car was parked in the driveway. There was one vehicle already parked in the driveway on the right hand side and Mr. Savarese's vehicle was parked directly behind it. This is a residential neighborhood. The car was parked six to ten feet from the road.

Special Agent Yauger had DEA raid gear which had included raid pants, ballistic vests with identification on the top saying on the front panel police with the DEA little badge on the side. He had a duty belt on that had the weapon on the side of his right leg.

Special Agent Yauger observed a basket in the front of the front passenger seat. He could see items in the basket through the window. He asked Mr. Savarese if they could inspect the basket and Mr. Savarese said yes. Mr. Savarese retrieved the basket and showed it to the officers. Nothing illegal appeared to be in the basket. Mr. Savarese put the basket back.

Special Agent Farano told Mr. Savarese that he was free to go. Mr. Savarese did not leave. Special Agent Farano retreated a certain distance away to the house, expecting Mr. Savarese to get into his car and leave. A few minutes later, he went again to Mr. Savarese and explained that he was free to leave. Mr. Savarese just stood there and looked at him. Special Agent Farano said to him: "do you understand that you can leave, do you understand me?" Mr. Savarese did not give a response. Special Agent Farano asked him to leave two or three times. When Special Agent Farano went to the porch, he was thirty to forty feet away. Mr. Savarese just stood there by himself for a period.

At some point thereafter, Special Agent Yauger engaged Mr. Savarese in conversation again and asked if it would be alright if they searched the vehicle. Mr. Savarese said that he did not know if he should let them do that. Special Agent Yauger asked him a second time if he could search the vehicle and Mr. Savarese did not respond. Special Agent Yauger asked him if there was any pseudoephedrine in the vehicle and could the police search the vehicle and look in the trunk. Again, Mr. Savarese did not answer. Special Agent Yauger kept asking him whether or not there were boxes of pseudoephedrine in there. He said: "do you have twenty boxes?" "Are there thirty boxes in there?" Mr. Savarese's answer was maybe.

During this questioning there were two or three officers in the front yard area. The conversation was two to five minutes. Forty-five minutes elapsed between the time Mr. Savarese arrived and the time that Mr. Savarese responded "maybe."

Detective Errington then went outside and Special Agent Yauger informed him that Mr. Savarese had said that he had 20 to 30 boxes of pseudoephedrine products in the trunk of his car. Detective Errington asked Mr. Savarese if he had any ephedrine products in his vehicle and Mr. Savarese said yes. He told Detective Errington that he believed he had 20 to 30 boxes of pseudoephedrine boxes in the trunk of his vehicle. Detective Errington asked for a consent to search the vehicle. Mr. Savarese said no and asked, "why do you want to look in my vehicle?" Detective Errington spoke with him for several minutes. He told Mr. Savarese that he was going to seize his vehicle to obtain a search warrant. Detective Errington asked him why he had those 20 to 30 boxes in his car. Mr. Savarese responded but Detective Errington could not recall exactly what he said. He said something about having a bad cold. They were laughing about the products in the car, joking around about him having a bad cold.

Detective Errington explained to Mr. Savarese that he was seizing the vehicle to obtain a search warrant. Detective

Errington asked Mr. Savarese for the keys and he gave them to him and he secured the vehicle. When Detective Errington left the residence, Mr. Savarese was still at the residence. Mr. Savarese was never given any Miranda Rights, and he was not touched or physically restrained in any way. No officer drew his weapon.

On Monday, January 14, 2002, Detective Errington went to a Berks County District Justice to obtain a search warrant for Mr. Savarese's vehicle. He seized forty boxes of Equate brand pseudoephedrine from the trunk of the vehicle. He seized nine more boxes--four boxes of Home Best brand pseudoephedrine and five boxes of Equate pseudoephedrine--from the floor behind the driver's seat of the vehicle as well as a homemade metal press, a day planner and a key ring. A home made metal press is a platform like a steel plate with holes drilled in it matched to the exact size of the blister packs that come out of the Equate brand pseudoephedrine so that you could place a blister pack on there and crank down on the handle and it would pop all the pills out at one time. There are thirty to thirty-five pills in a blister pack. On one of the dates in the daily planner there was an entry where one of the dates had written Walmart.

II. Conclusions of Law

A. Defendant Ballou's Motion to Suppress

Mr. Ballou contends that there was insufficient probable cause to support the issuance of the search warrant, because the warrant provided no indication of reliability, veracity, or basis of knowledge of the confidential informant. He argues that Detective Errington intentionally and/or recklessly misrepresented material facts in his affidavit. Mr. Ballou also contends that if there was sufficient probable cause, the warrant is nevertheless invalid because it was not particular or limited in breadth, and that if the warrant is valid, that the officers exceeded the scope of the warrant.

A totality of the circumstances test is used to determine whether probable cause exists to support the issuance of a search warrant. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). The issuing authority must make a practical common sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Id.; see also United States v. Williams, 3 F.3d 69, 72 (3d Cir. 1993). Police corroboration of an informant's tip imparts additional reliability to the information supplied. Gates, 426 U.S. at 244-45. To be valid on its face a

search warrant must provide a particular description of the things to be seized. Anderson v. Maryland, 427 U.S. 463, 480 (1976).

The search warrant for Mr. Ballou's residence was supported by probable cause. There was much more than the information received from the confidential source. The police determined where Mr. Ballou lived and performed several trash pulls at his residence. Those trash pulls have not been challenged. During those trash pulls, the police seized items used in the manufacture of methamphetamine. The police also conducted surveillance of Mr. Ballou that established a very suspicious pattern of purchases by Mr. Ballou of decongestant products.

The Court finds that there was no intentional or reckless misrepresentation of material fact in the affidavit. The warrant complied with all legal requirements.

Although the defendant did not specifically raise the issue of consent to search the storage locker in his papers, the Court has considered the issue and concluded that valid consents to search were obtained from both Mr. Wiggins and Mr. Ballou.

Government agents may search based on a person's voluntary consent, and any evidence discovered may be seized and used against the person. Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973). The government must prove that consent was

voluntary. Schneckloth, 412 U.S. at 222. Courts determine whether consent was voluntary by examining the totality of the circumstances surrounding the consent, including the age, education, intelligence of the person, and whether the questioning was repeated or prolonged. United States v. Kim, 27 F.3d 947, 955 (3d Cir. 1994).

A person with common authority over or other sufficient relationship to the defendant's premises or effects may consent to a search of those premises or effects. See United States v. Matlock, 415 U.S. 164, 169-72 (1977).

Applying these principles to the facts of this case, the Court concludes that Mr. Wiggin's consent to the search of the storage facility was valid.

The fact that the locker was "divided" between Mr. Wiggins and the defendant makes no difference. See Fraizer v. Cupp, 394 U.S. 731, 740 (1969) (consent from co-user of a duffel bag valid even where co-user was authorized to use only one compartment of bag).

The consent of Mr. Ballou was also valid. He was advised by his own counsel before he gave his consent.

B. Defendant Savarese's Motion to Suppress

Mr. Savarese contends that the physical evidence police seized as a result of the search of his car should be suppressed

because the search resulted from statements he made to the police without having first been given Miranda warnings. Mr. Savarese contends that he made those statements under custodial interrogation, so they should also be suppressed.

The government may not use statements stemming from a custodial interrogation of a suspect without first warning the suspect that he has the right to remain silent, that any statement he makes may be used against him or her, and that he has the right to counsel, either retained or appointed. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The government may use statements stemming from an interrogation of a suspect without having first having issued a Miranda warning if the suspect is "not in custody". Stansbury v. California, 511 U.S. 318, 322 (1994).

Custody means deprivation of "freedom of action in any significant way." Miranda, 384 U.S. at 444. To determine whether a person is in custody, the ultimate test is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983). The objective circumstances of the interrogation, not the subjective beliefs of either the authorities or the suspect, determines whether the suspect is in custody. Stansbury, 511 U.S. at 323. A person is in custody only if a reasonable person in the person's position would not

feel free to terminate the interrogation and leave. Thompson v. Keohane, 516 U.S. 99, 112 (1995); United States v. Mesa, 638 F.2d 582, 587 n.4 (3d Cir. 1980). Whether the interrogating officers have focused their suspicions upon the person being interrogated is not relevant for the issue of custody. Stansbury, 511 U.S. at 326.

Probable cause to search Mr. Savarese's car came from his statements. If the statements were illegally obtained, then the physical evidence seized from his car must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 484 (1963).

The Court concludes that Mr. Savarese was not in custody when he was questioned outside Mr. Ballou's residence. Mr. Savarese voluntarily pulled into the driveway of the residence when there were marked and unmarked police cars in the area and uniformed police officers and DEA agents inside and outside the house. He was turned away from the house by the police and explicitly told at least three and perhaps five times that he could leave. He chose to stay.

The essence of the defendant's argument at the suppression hearing was that the repeated questioning by the police was "coercive." Certainly, a person being questioned by the police may feel some pressure to respond; but the issue is whether a reasonable person in the defendant's position would have felt free to leave. A reasonable person who was told by two

law enforcement agents at different times that he could leave would feel free to leave. Otherwise, someone standing on a street corner whom the police ask a series of questions would be in custody. See United States v. Leese, 176 F.3d 740, 742-744 (3d Cir. 1999) (suspect interrogated by armed postal inspector who told her she was not under arrest not in custody); see also Cruz v. Miller, 255 F.3d 77, 78 (2d Cir. 2001) (person interrogated by police who had drawn weapons but did not restrain him not in custody); United States v. Fiske, 82 F.3d 1315 (5th Cir. 1996) (person questioned after failing to leave a search scene despite having been told to do so not in custody).

