

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

UNITED STATES OF AMERICA :
 :
 v. :
 : CRIMINAL ACTION NOS.
 JIMMY RIVERA-PAGAN : 06-592-1
 JOSE VEGAS-TORRES : 06-592-2
 IRVING CABASSA-RIVERA : 06-592-3

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

FEBRUARY 8, 2007

The three Defendants, Jimmy Rivera-Pagan, Jose Vegas-Torres, Irving Cabassa-Rivera, are each charged with one count of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. § 846, and one count of possession with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A).

Defendants have moved to suppress the cocaine found in their¹ luggage because, they argue, the search warrant pursuant to which the luggage was searched was not based on probable cause (doc. nos. 42-45, 54). Specifically, Defendants argue that the affidavit relied upon by the magistrate judge in approving the search warrant did not supply probable cause for the search.

¹ As explained below, whether the luggage or the cocaine was actually "theirs" is of some dispute.

The Government opposes the suppression motions, arguing that the affidavit provided probable cause for the search warrant (doc. no. 50).²

For the reasons that follow, the Court will deny Defendants' suppression motions.

I. BACKGROUND

On September 26, 2006, DEA Special Agent Merrit R. Gibson, Jr., submitted an affidavit in support of a search warrant to Magistrate Judge Timothy Rice of the Eastern District of Pennsylvania. Judge Rice, after reviewing the affidavit and proposed description of the property to be searched, issued the search warrant.

The property to be search was listed in Attachment "A" to the warrant:

Six items of luggage from US AIR flight #1996, described as follows: (1) Tag #047797 attached to a gray Travelmate suitcase; (2) Tag #047798 attached to a black Travelmete suitcase; (3) Tag #047821 attached to a gray Travelmate suitcase; (4) Tag # 047822 attached to light gray Travelmate suitcase with orange striping; (5) Tag #047828 was attached to a black Travelmate suitcase; (6) Tag #047829 attached to a light gray Travelmate suitcase with orange striping.

² The Government also argues that (1) even if the affidavit did not provide probable cause, any evidence obtained as a result of the search of the luggage is admissible under the "good faith" exception, and (2) Defendants lacked standing to contest the search. Because the Court determines that affidavit provided probable cause for the search, the Court need not reach these arguments.

The first five paragraphs of the affidavit detail Agent Gibson's background--11 years as a special agent with the DEA and specialization in narcotics smuggling and investigations. The following are the contents, verbatim, of paragraphs 6 through 15 of the affidavit:

6. During the week of September 25, 2006, members of the DEA, Philadelphia Field Division, Group 8 received information from the San Juan, Puerto Rico DEA office regarding the possible shipment of a quantity of cocaine destined to the Philadelphia International Airport via commercial air carrier.

7. The San Juan DEA office also provided the Philadelphia Field Division with possible couriers known to the San Juan DEA office as Jose VEGA, Irving CABASSA and Jimmy RIVERA. All subjects purchased their flight ticket at the US Airway ticket counter at the Luis Marin Munoz International Airport, San Juan, Puerto Rico.

8. On September 26, 2006, members of the San Juan, Puerto Rico DEA Office received information that Jose VEGAS, Irving CABASSA and Jimmy RIVERA checked in at the US Airways airline, Luis Marin Munoz International Airport. Each passenger had two pieces of luggage, each passenger purchased their ticket prior to boarding their flight and paid cash.

9. The tickets were one-way only to LaGuardia International Airport in New York, with a connection at the Philadelphia International Airport. Jose VEGA's luggage was assigned baggage ticket numbers 047821 and 047822. Irving CABASSA's luggage was assigned baggage ticket numbers 047828 and 047829. Jimmy RIVERA's luggage was assigned baggage ticket numbers 047797 and 047798. Four of the six pieces of luggage were subjected to secondary inspection by the Transportation Security Administration (TSA) in San Juan, Puerto Rico. That inspection revealed that four of the pieces of luggage, previously mentioned, were virtually empty, except for a few items.

10. According to information received from law

enforcement authorities and previous investigations, approximately twenty-five kilograms of cocaine were seized on September 21, 2006 at the Philadelphia International Airport in a suitcase with the baggage claim assigned to Christian CHICLANA CARLO.

11. The airplane carrying the luggage containing the twenty-five kilograms of cocaine originated at the Luis Marin Munoz International Airport, San Juan, Puerto Rico. The defendant in that case, Christian CHICLANA CARLO was identified by the San Juan Puerto Rico Office as a possible courier that was traveling from San Juan, Puerto, Rico, to Philadelphia, Pennsylvania en route to LaGuardia International Airport in New York, via US Airways.

12. On September 26, 2006, the three passengers identified in paragraphs six and seven had at least the following pieces of luggage. Three of the pieces of luggage were gym type bags with the word "Tour" and a red letter "X." A fourth piece of luggage was a black roller type suitcase with no distinct identifiers.

13. It is the affiant's belief that this organization consist of members that are employed as airport baggage handlers that are co-conspirators with the drug couriers. These airline employees take the assigned baggage tickets and place them on unidentified luggage that couriers retrieve upon the completion of their travel. Philadelphia Field Division confirmed the travel plans of Jose VEGA, Irving CABASSA and Jimmy RIVERA. According to flight information, Jose VEGA, Irving CABASSA and Jimmy RIVERA were scheduled to arrive at the Philadelphia International Airport on September 26, 2006 at approximately 11:56 a.m. aboard US Airway flight number 1996.

14. On September 26, 2006, members of the Philadelphia Field Division, established surveillance at gate B-4 of the Philadelphia International Airport and observed Jose VEGA, Irving CABASSA and Jimmy RIVERA deplane US AIRWAY flight 1996. Surveillance agents observed Jose VEGA, Irving CABASSA and Jimmy RIVERA proceed to gate F-23³ of the Philadelphia International

³ The typewritten affidavit has a black line here; "F-23" is handwritten in.

Airport and depart en route to La Guardia International Airport, located in Queens, New York.

15. Based on the above facts, your affiant believes that there is probable cause to believe that there is located within the aforementioned luggage controlled substances, in violation of Title 21 United States Code, Sections 846 and 841(a)(1), (b)(1)(A)(ii)(II).

There is no other relevant information contained in the affidavit or the search warrant.⁴

II. DISCUSSION

A. The Legal Standard for Probable Cause for a Search Warrant

In deciding whether there was probable cause for Judge Rice to issue the search warrant, the Court must determine whether such probable cause existed on only the facts presented in

⁴ The affidavit contained the following sentence in paragraph 5: "This summary, however, does not purport to contain all of the information known to me."

While the plane was in Philadelphia, apparently before the search warrant was obtained, a DEA drug-sniffing dog alerted to the six bags in question. In addition, around the same time, the TSA subjected the bags to x-ray screening, which showed "numerous brickshaped objects," consistent with drug trafficking. Govt's Opp. (doc. no. 50), at 5.

Any information that Agent Gibson might have orally related to Judge Rice is not part of the record in this case and, indeed, would be irrelevant in the Court's probable cause analysis. Moreover, as these factual averments (the drug-sniffing dog and the TSA x-rays) were not in the affidavit, the Court will not consider them in deciding whether the affidavit provided probable cause for the search warrant. United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001).

writing to Judge Rice. United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001). Although the Court must find that probable cause existed on these facts only, “[t]he supporting affidavit must be read in its entirety and in a commonsense and nontechnical manner.” United States v. Conley, 4 F.3d 1200, 1206 (3d Cir. 1993). “The issuing judge or magistrate may give considerable weight to the conclusions of experienced law enforcement officers regarding where evidence of a crime is likely to be found and is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense.” United States v. Whitner, 219 F.3d 289, 296 (3d Cir. 2000) (quoting United States v. Caicedo, 85 F.3d 1184, 1192 (3d Cir. 1996)).

The test is one of totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983); United States v. Daly, 937 F. Supp. 401, 407 (E.D. Pa. 1996) (Robreno, J.). There is probable cause for a search warrant when “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Gates, 462 U.S. at 238.

“A magistrate’s determination of probable cause should be paid great deference by reviewing courts.” Conley, 4 F.3d at 1203 (quoting Gates, 462 U.S. at 236 (emphasis in Conley)).

“Even if a reviewing court would not have found probable cause in a particular case, it must nevertheless uphold a warrant so long

as the issuing magistrate's determination was made consistent with the minimal substantial basis standard." Id. at 1205. Although "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," United States v. Jones, 994 F.2d 1051, 1057-58 (3d Cir. 1993) (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)), a reviewing court should not simply rubber stamp a magistrate judge's finding. United States v. Zimmerman, 277 F.3d 426, 433 (3d Cir. 2002).

Thus, in deciding whether the search warrant was supported by probable cause, the Court must determine whether, on the four corners of the affidavit, there was a substantial basis for the magistrate judge's determination that probable cause existed. The Court must be wary, however, not to supplant its own evaluation of the affidavit for the magistrate judge's.

B. Application of the Affidavit to the Legal Standard

The Court must look to the text of the affidavit to determine if it provided a basis for the magistrate judge to issue the search warrant.

Paragraphs 6 and 7 of the affidavit state that the San Juan DEA provided the Philadelphia DEA with information that Defendants were suspected drug couriers and that a shipment of cocaine might be arriving at the Philadelphia airport on a

commercial airplane.⁵ Paragraphs 10 and 11 state that the San Juan DEA provided similar information (the identity of a possible drug courier and the possible transportation of cocaine on a US Airways flight from San Juan to Philadelphia to New York) the week prior and that this information proved to be reliable.

While the source of the San Juan DEA's information was unknown, similar information from the San Juan DEA had proved reliable at least once in the recent past and therefore the San Juan DEA's relaying of information to the Philadelphia DEA is entitled to at least some weight. Moreover, the modus operandi of this particular drug organization appeared to be to send couriers on a US Airways flight from San Juan to Philadelphia to New York. Here, the suspected drug couriers (Defendants) used the same airline and same flight plan.

Paragraphs 8 and 9 state that Defendants purchased their one-way tickets in cash immediately⁶ before the flight. In

⁵ Defendants argue that the warrant is invalid because the affidavit does not state the basis for the San Juan DEA's information that Defendants were suspected drug couriers. Under the pre-Gates standard, in which an affiant was required to state both the basis for a particular piece of knowledge and the veracity (or reliability and credibility) of that knowledge, see Gates, 462 U.S. at 239 & n.4, this failure would likely have been fatal. However, today the lack of a basis for this information is only one piece of the larger affidavit pie. The San Juan DEA's information is discounted (but not entirely ignored) because the magistrate judge had no way of knowing its source or reliability.

⁶ The affidavit states that Defendants "purchased their ticket[s] prior to boarding their flight." Of course Defendants

addition, the four checked bags that were inspected by TSA were almost completely empty. Therefore, Defendants (1) purchased one-way tickets (2) in cash (3) immediately before the flight, and (4) each checked two almost-empty bags. The magistrate judge was entitled to infer that someone with Agent Gibson's expertise would determine that these actions are consistent with drug courier activity.

Paragraph 12 identified the characteristics of four of the bags that were checked by Defendants at the San Juan airport. Three of the bags were gym bags with the word "Tour" and a red letter "X." Attachment "A" to the search warrant lists the six bags to be searched at the Philadelphia airport: all are Travelmate suitcases; none are gym bags or have the word "Tour" or the letter "X" on them.

Attachment "A" and paragraph 12, read together, provide the strongest support for probable cause: Defendants' bags that were checked in San Juan are not the same bags that arrived in Philadelphia. Of course, the affidavit could have detailed that the characteristics of the bags to be searched in Philadelphia did not match up with the characteristics of the bags checked by

bought their tickets before they boarded the plane, as opposed to after they were already onboard. The obvious implication of this statement is that Defendants purchased their tickets immediately before boarding the plane.

Defendants in San Juan.⁷ Nevertheless, these facts are present in the affidavit,⁸ so long as one reads Attachment "A" and paragraph 12 in conjunction, and the conclusion that the bags were switched could be inferred from these facts.

Finally, paragraph 13 provides the suspected modus operandi for the drug smuggling operation: co-conspirators who are airport baggage handlers in San Juan "take the assigned baggage tickets and place them on unidentified luggage that the couriers retrieve upon the completion of their travel." This belief, by a seasoned DEA agent, supports a finding that there is probable cause that Defendants' bags were switched by a co-conspirator at the San Juan airport and contained cocaine upon their arrival in Philadelphia.

Defendants are correct that the factual averments, if viewed in isolation, would not provide probable cause to issue a search

⁷ It appears that Agent Gibson had a very short period of time to locate the six bags in question amongst all the luggage from the plane, compose the affidavit, obtain the search warrant, and then search the bags, all before the plane left for New York. In any event, Agent Gibson was not required to compose the affidavit in a technical manner. Conley, 4 F.3d at 1206.

⁸ There is no merit to the argument that Attachment "A" cannot be considered here because it is not "part" of the affidavit. To be included as an attachment to the search warrant, the information in the attachment must have been presented to the magistrate judge prior to his issuing the search warrant. The information in Attachment "A" is thus a "fact" considered by the magistrate judge. See Jones, 994 F.2d at 1055 (holding that a reviewing court looks to the "facts that were before the magistrate judge, i.e., the affidavit" (emphasis added)).

warrant for the bags. However, when viewed as a whole, drawing reasonable inferences, and considering the totality of the circumstances, the Court is convinced that they provide a sufficient basis for the magistrate judge's conclusion that they supported a search warrant. See Conley, 4 F.3d at 1206.

Defense counsel posited at oral argument that the affidavit was lacking a connecting thread and that it was the job of the affiant, not the magistrate judge, to draw reasonable inferences from the facts provided. Of course, the affidavit could have made a stronger case: the connection between the courier operation the week earlier and Defendants could have been made clearer, the fact that the Defendants' bags upon arrival in Philadelphia did not match the bags they checked in San Juan could have been explicitly stated, and Defendants' actions at airport could have been tied to the actions of a typical drug courier.

But the question for the Court is not whether the affidavit could have made a stronger case; rather, the question is whether the averments add up to probable cause. Defendants have not pointed to any authority that the magistrate judge himself cannot draw reasonable inferences from the facts provided. The magistrate judge must make his determination on the facts provided, Conley, 4 F.3d at 1203; as a judicial officer--and indeed a reasonable person--he is entitled to draw inferences and

make conclusions based on these facts.

In short, the affidavit states that Defendants bought one-way tickets, in cash, the day of their flight; checked bags that were almost empty; traveled a route and used an airline that had recently been used by drug couriers; and were in possession of claims checks that corresponded to bags that they did not check. On this basis, there was probable cause for the magistrate judge to issue the search warrant.

III. CONCLUSION

The Court finds that Agent Gibson's affidavit provided a substantial basis for Judge Rice's conclusion that there was probable cause to issue a search warrant to check for drugs in Defendants' luggage. Therefore, Defendants' motions to suppress will be denied.

