

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 :
 KEVIN SMALLER : NO. 15-475
 :

MEMORANDUM

SURRICK, J.

AUGUST 26, 2016

Presently before the Court is Defendant Kevin Smaller’s Motion to Suppress Evidence. (ECF No. 37.) For the following reasons, the Motion will be denied.

I. BACKGROUND

A. Factual Background

On September 1, 2015, Philadelphia Police Officer Stephen Dmytryk prepared an Affidavit for Search and Seizure Warrant for the premises located at 2836 North Bambrey Street in Philadelphia, and a silver Chevrolet automobile displaying Delaware temporary plate number XP728192. On September 2, 2015, the Affidavit was presented to a judge. The search warrant was issued, and on September 2, 2015, it was executed. The Affidavit for the search warrant contained the following information.

Defendant Kevin Smaller—also known as “Woo”—became the target of a criminal investigation in August 2015 when a reliable confidential informant (“CI”) told law enforcement officers that Smaller sold large amounts crystal methamphetamine (“Crystal Meth”) and phencyclidine (“PCP”) in his north Philadelphia neighborhood. (Aff., Mem. in Supp. of Mot. to Suppress Evid. Ex. A, ECF No. 37.) The Philadelphia Police Department subsequently arranged for the CI to make controlled purchases of Crystal Meth from Smaller. (*Id.*) On August 26,

2015, and on September 1, 2015, the officers gave the CI prerecorded money to purchase \$500 worth of Crystal Meth from Smaller. (*Id.*) Prior to each controlled buy, the officers first met with the CI to ensure that he did not already have drugs or money on his person. (*Id.*) After confirming that the CI did not already possess drugs or money, the officers gave the CI prerecorded money and listened as he made arrangements to purchase Crystal Meth from Smaller. (*Id.*) On each occasion, the CI and Smaller met at an agreed upon place and completed the drug transactions as planned. (*Id.*) The officers watched from nearby. (*Id.*) The officers who observed the August 26 transaction saw Smaller arrive at the predetermined location in a silver Chevrolet, temporary Delaware plate number XP728192. (*Id.*) They saw the CI give Smaller money in exchange for a small item containing what, upon inspection, they believed to be Crystal Meth. (*Id.*) After the transaction, the officers' surveillance of Smaller continued. (*Id.*) The officers followed Smaller from the location of the controlled buy to 2836 North Bambrey Street. (*Id.*) They watched Smaller park the silver Chevrolet and let himself into the residential property with a door key. (*Id.*)

On August 31, 2015, the officers surveilled the 2836 North Bambrey Street property. (*Id.*) They observed Smaller enter and exit the residence numerous times using a door key. (*Id.*) In addition, the officers observed that the silver Chevrolet that Smaller used during the August 26 controlled buy was parked at the residence. (*Id.*)

On September 1, 2015, the officers returned to the Bambrey Street property at 6:30 a.m. (*Id.*) The silver Chevrolet was parked there. (*Id.*) On that same day, the officers worked with the CI to set up another controlled buy. (*Id.*) Just as they had done on August 26th, the officers first met with the CI to ensure that he did not possess any money or contraband. (*Id.*) The CI then contacted Smaller and arranged to meet him at a nearby location. (*Id.*) This time the

officers set up surveillance at the Bambrey Street property and at the location at which Smaller and the CI agreed to meet. (*Id.*) Shortly after the CI made arrangements to meet Smaller, the officers who surveilled the Bambrey Street residence observed Smaller leave the property. (*Id.*) Smaller drove away in the same car he had driven before, the silver Chevrolet. (*Id.*) The officers followed Smaller to the place where he arranged to meet the CI. (*Id.*) When Smaller arrived, the officers watched the CI get into Smaller's vehicle and exit approximately two minutes later. (*Id.*) The CI returned to the officers with a knotted bag that contained a "white crystal substance." (*Id.*) As Smaller drove away, two officers followed him. (*Id.*) Smaller led the officers back to the 2800 block of Bambrey Street. (*Id.*) After parking the silver Chevrolet, Smaller used a key to let himself back into the 2836 North Bambrey Street residence. (*Id.*)

On September 2, 2015, when the search warrant was executed at the Bambrey Street residence the officers found, *inter alia*, some of the prerecorded cash that was given to the CI just before the controlled buys; a loaded firearm; plastic bags containing Crystal Meth; and a key to the property's front door.¹ Smaller was present when the search warrant was executed, and he was taken into custody. (Mem. in Supp. of Mot. to Suppress Evid. Ex. B.)

B. Procedural Background

On September 30, 2015, a grand jury in the Eastern District of Pennsylvania returned an Indictment charging Smaller with two counts of distribution of Crystal Meth, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Counts One and Two); intent to distribute one kilogram or more of PCP, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), (b)(1)(B) (Count Three); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C § 924(c) (Count Four); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1)

¹ The silver Chevrolet was also searched. However, Defendant is seeking suppression of only those items seized during the search of the residence.

(Count Five). (ECF No. 1.) On July 25, 2016, Smaller filed the instant Motion to Suppress Evidence. (Mot. to Suppress.) On August 2, 2016, the Government filed a Response in Opposition to Defendant’s Motion to Suppress. (Resp., ECF No. 39.) Smaller filed a Reply to the Government’s Response on August 16, 2016. (Reply, ECF No. 40.) Trial is scheduled to begin on September 21, 2016. (ECF No. 33.)

II. LEGAL STANDARD

The Fourth Amendment guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. It further provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” *Id.*; see also *United States v. Christine*, 687 F.2d 749, 756 (3d Cir. 1982). Evidence obtained in violation of the Fourth Amendment is not admissible at trial. See, e.g., *Herring v. United States*, 555 U.S. 135, 139-40 (2009) (explaining history of exclusionary rule). “The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.” *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978).

III. DISCUSSION²

A. Probable Cause Claim

Smaller argues that any evidence seized from the 2836 North Bambrey Street property must be suppressed because the authorizing search warrant was not supported by probable cause. (Mem. in Supp. of Mot. to Suppress Evid. 2.) In Smaller’s view, the Affidavit fails to establish

² To establish “standing” to pursue a Fourth Amendment claim, “a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.” *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (citation omitted). The Government does not contest Smaller’s standing to challenge the search at issue.

any “link” or “nexus” between Smaller’s alleged drug dealing activities and the 2836 North Bambrey Street property. (*Id.* at 3.) Smaller contends that the controlled drug transactions did not take place at 2836 North Bambrey Street and that the Affidavit does not contain information to support the belief that there was a fair probability that contraband would be found at that location. (*Id.* at 2-3.)

In issuing a search warrant based upon probable cause, a judge must determine that there is a “fair probability that . . . evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (citing *United States v. Jones*, 362 U.S. 257, 271 (1960)). When faced with a challenge to a judge’s probable cause determination, the district court’s role is not to conduct a *de novo* review, but simply to ensure that the judge had a substantial basis for concluding that probable cause existed. *United States v. Stearn*, 597 F.3d 540, 554 (3d Cir. 2010); *see also Gates*, 462 U.S. at 236 (“A magistrate’s ‘determination of probable cause should be paid great deference by reviewing courts.’” (citation and internal quotation marks omitted)). In determining whether probable cause exists to support the issuance of a search warrant, we employ a totality-of-the-circumstances approach. *Gates*, 462 U.S. at 230-31. The United States Supreme Court has cautioned that probable 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.” *Id.* at 232. Therefore, the analysis here requires consideration of the “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Id.* at 231 (citation and internal quotation marks omitted). The probable cause determination by the issuing authority here was based on the information detailed in the Affidavit. Our review considers whether within the four corners of the Affidavit there is sufficient evidence to establish probable cause.

A search warrant affidavit may contain direct evidence linking the place to be searched to the crime. However, direct evidence is not required. Probable cause to search may be based on circumstantial evidence, the drawing of reasonable inferences from the facts accepted as true. *Jones*, 994 F.2d at 1056. The judge who issued the search warrant determined that there was a sufficient link between Smaller’s alleged drug trafficking activity and the Bambrey Street residence. This determination was based on the drawing of a reasonable inference from the facts set forth in the Affidavit. The Third Circuit has repeatedly reaffirmed the “reasonable inference . . . that drug dealers often store evidence of drug crimes in their residences.” It has maintained, however, that

“application of this inference [must be] based on evidence supporting three preliminary premises: (1) that the person suspected of drug dealing is actually a drug dealer; (2) that the place to be searched is possessed by, or the domicile of, the dealer; and (3) that the home contains contraband linking it to the dealer’s activities.”

Stearn, 597 F.3d at 559 (citing *United States v. Burton*, 288 F.3d 91, 104 (3d Cir. 2002))

(internal quotation marks omitted).

After carefully applying the principles set forth by the Supreme Court and the Third Circuit, we are satisfied that the Affidavit contains more than sufficient information to support the judge’s issuance of the warrant in question. The Affidavit provides that in addition to receiving a tip from a reliable CI that Smaller was a drug dealer, law enforcement officers observed Smaller sell Crystal Meth to the CI on at least two occasions. (Aff. 1.) Smaller came from and returned to the Bambrey Street residence during each drug sale. (*Id.*) On the first occasion, Smaller was observed driving to 2836 North Bambrey Street immediately after providing drugs to the CI. (*Id.*) During the second drug transaction, officers witnessed Smaller leave 2836 North Bambrey Street after receiving a call from the CI and just before he met the CI to complete the arranged drug deal. (*Id.*) Then—after collecting proceeds from the drug sale—

Smaller returned directly to the Bambrey Street address. (*Id.*) During each occurrence, Smaller's trip to and from the Bambrey Street residence was uninterrupted by an intervening stop. (*Id.*) This activity reasonably leads to the conclusion that Smaller exited the residence with drugs on his person and entered the residence in possession of drug proceeds. *United States v. Martinson*, 811 F. Supp. 1097, 1102 (E.D. Pa. 1993) ("The affiant . . . does not have to actually see the evidence in a particular place to establish a sufficient nexus between items to be seized and the place to be searched." (citation omitted)), *aff'd*, 26 F.3d 124 (3d Cir. 1994).

Smaller argues that the Affidavit provides no support for the finding that evidence from his suspected criminal activity would be discovered at the Bambrey Street residence, because "the controlled transactions occurred elsewhere." (Mem. in Supp. of Mot. to Suppress Evid. 3.) This argument is unavailing. The Third Circuit has noted that "evidence of involvement in the drug trade is likely to be found where the dealer resides." *United States v. Whitner*, 213 F.3d 289, 299 (3d Cir. 2000). It was reasonable for the issuing authority to conclude, based upon Smaller's actions during the surveillance, that Defendant was engaged in the business of selling narcotics. In addition, Smaller's entry into and exit from 2836 North Bambrey Street during the course of the drug transactions and during surveillance provided an explicit link between his drug activity and the property in question.

The information detailed in the Affidavit clearly demonstrates that 2836 North Bambrey Street was "possessed by, or the domicile of" Smaller. *Stearn*, 597 F.3d at 559 (citing *Burton*, 288 F.3d at 104). Law enforcement officers observed Smaller repeatedly enter and exit 2836 North Bambrey Street using a door key. (Aff. 1.) In each instance, Smaller was unaccompanied. (*Id.*) On August 31, 2015 and September 1, 2015, the officers conducted surveillance of 2836 North Bambrey Street. (*Id.*) They saw Smaller's car parked at the Bambrey Street residence at

10 a.m. and at 6:30 a.m. (*Id.*) “The supporting affidavit must be read in its entirety and in a common sense and nontechnical manner.” *United States v. Conley*, 4 F.3d 1200, 1206 (3d Cir. 1993). Read in this manner, the information detailed in the Affidavit clearly supports the inference that Smaller possessed 2836 North Bambrey Street. Moreover, the Affidavit contains more than sufficient facts to support the conclusion that there was a “fair probability” that drugs and other evidence of Smaller’s criminal activity would be found at the property. *Gates*, 462 U.S. at 238. We are satisfied that the issuing authority here correctly concluded that there was probable cause to issue the search warrant in question.

B. “Good Faith” Exception

Even if one were to somehow determine that the search warrant was defective, the items seized during the search would be admissible under the good-faith exception to the exclusionary rule. “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring*, 555 U.S. at 144. Even if a warrant lacks probable cause, “the exclusionary rule does not apply if the police acted ‘in objectively reasonable reliance’ on the subsequently invalidated search warrant.” *Id.* at 142 (quoting *United States v. Leon*, 468 U.S. 897, 922 (1984)).

There are “four limited circumstances” in which a police officer’s reliance on a warrant will not be considered “objectively reasonable”:

- 1) where the magistrate judge issued the warrant in reliance on a deliberately or recklessly false affidavit;
- 2) where the magistrate judge abandoned his or her judicial role and failed to perform his or her neutral and detached function;
- 3) where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or
- 4) where the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized.

United States v. Tracey, 597 F.3d 140, 151 (3d Cir. 2010) (citations omitted). This case fits none of these circumstances. There is no evidence to suggest that any part of the affidavit was “deliberately or recklessly false.” There is no reason to suspect that the judge failed to properly perform his judicial responsibility to be “neutral and detached.” Moreover, the Affidavit is not so lacking in probable cause that the agents should have recognized that it was defective. The good-faith exception to the exclusionary rule would clearly apply here.

IV. CONCLUSION

For the foregoing reasons, we conclude that Defendant Smaller’s Motion to Suppress Evidence seized at the 2836 North Bambrey Street residence is without merit. Accordingly, the Motion will be denied.

BY THE COURT:

/s/ R. BARCLAY SURRECK
U.S. DISTRICT JUDGE

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ORDER

AND NOW, this 26th day of August, 2016, upon consideration of Defendant Kevin Smaller's Motion to Suppress Evidence (ECF No. 37), and all papers and exhibits submitted in support thereof and in opposition thereto, it is **ORDERED** that the Motion is **DENIED**.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. BARCLAY SURRICK
U.S. DISTRICT JUDGE