



entered the house, they found two young children around ten or twelve years old sleeping together in a bedroom. The police told the children who they were and Officer Tyler calmed them down. The police asked where the children's mother and brother were. The children replied that neither one was at home. They said that their mother was at work.

The police searched the home and Officer Tyler called Mrs. Johnson at her place of employment. He told her that he was executing a warrant at her residence. She said that she was not able to come home. She gave the police a cell phone number for Hasan Johnson, her son.

Officer Tyler then contacted Mr. Johnson on his cell phone. He told him that he was at his home at 1229 Clover Lane and had recovered some drugs. Officer Tyler knew Mr. Johnson prior to the execution of the search warrant as someone in the neighborhood. Officer Tyler would nod to him if he saw him. He told Mr. Johnson that he was Officer Tyler from the Narcotics Unit. Within five minutes, Mr. Johnson arrived at the location. He came by car.

Mr. Johnson walked into the kitchen area and Officer Tyler gave him his Miranda warnings from a card he carried with him. Mr. Johnson said yes to each of the questions on the card. He gave up his rights and agreed to answer questions. They were in a small kitchen area where all of the evidence was displayed,

i.e., narcotics, fire arms, scales, packaging material, mail. Officer Tyler told Mr. Johnson that they recovered these items out of the bedroom downstairs. Mr. Johnson said that all of it was his and that no one else had any knowledge of it.

The police had found an empty gun box in the bedroom downstairs. They told Mr. Johnson they were still looking for the gun. Mr. Johnson told them that it was no longer around. Officer Tyler asked Mr. Johnson for consent to search the car. At first, Mr. Johnson said that he was not able to give permission to search because he was not the owner. Officer Tyler told him that he could consent even though he was not the owner of the car because he had personally seen him drive the vehicle on a daily basis for the past six months. Officer Tyler told him that he could give his consent because he had control of the vehicle. At that point, Mr. Johnson said "okay." Officer Tyler asked if there was anything in the car. Mr. Johnson said that he had a gun under the seat. One of the other officers got the keys and searched the vehicle. He recovered a weapon.

Mr. Johnson was advised that he was under arrest but he was not in handcuffs. Mr. Johnson asked that he not be handcuffed in front of his sister and Officer Tyler said "Okay" because Mr. Johnson was a "gentleman about the whole situation." Once Mr. Johnson said that the material was his, Officer Tyler told him that he was under arrest. Two other police officers

were in the kitchen when Officer Tyler asked Mr. Johnson about searching the vehicle. At the time consent was given, the firearms were holstered. Officer Tyler did not make any promises or threaten or coerce Mr. Johnson in any way in connection with obtaining consent to search.

Officer Tyler asked for permission to search Mr. Johnson's girlfriend's house. Mr. Johnson said that he could not give consent. Mr. Johnson's girlfriend then arrived on the scene and she gave consent to searching her home on Honan Street. The police left Clover Lane and went to Honan Street.

Mr. Johnson also gave consent to search another address on Worrell Street in Chester. During the time Officer Tyler was speaking with Mr. Johnson, Mr. Johnson did not appear to be under the influence of drugs and/or alcohol. Officer Tyler did not threaten or promise anything in order to obtain Mr. Johnson's waiver of his Miranda rights.

The Court finds Officer Tyler credible when he denied that he told Mr. Johnson when Mr. Johnson entered the kitchen that he better talk to them or the children were going to be taken away and his mother locked up. Officer Tyler did not tell Mr. Johnson that he had the option not to give consent.

Several pieces of mail were found in the basement with the defendant's name on it. There were also several pieces of

clothing that fit the defendant's stature. Mr. Johnson's statement was not a written one.

## II. Discussion

The defendant moves to suppress everything seized from the house at 1229 Clover Lane and the gun seized from the car Mr. Johnson was driving. The government does not intend to introduce into evidence anything seized during the searches of the other residences.

### A. Search of the House

The defendant seeks to suppress the evidence seized during the execution of a search warrant at 1229 Clover Lane, Chester, Pennsylvania, on December 9, 2003. The issues presented by the search of 1229 Clover Lane are: (1) whether the affidavit on which the warrant was based contained probable cause that drugs would be found in the residence; and (2) if the warrant was not based on probable cause, whether the good faith exception to the exclusionary rule applies in this situation. The Court holds that although probable cause did not exist to search the residence, the good faith exception to the exclusionary rule does apply because the affidavit was not "so lacking in indicia of probable cause as to render official belief

in its existence entirely unreasonable." United States v. Leon, 468 U.S. 897, 923 (1984) (quotations and citations omitted).

The affidavit was prepared by Officer David J. Tyler of the Chester City Police Department and Detective Mike Boudwin of the Delaware County Criminal Investigation Division (collectively, the "affiants") on December 8, 2003. Evidence in the affidavit may be broken into two general categories: (1) a tip provided to the affiants by a confidential informant ("CI"); and (2) Officer Tyler's attempts to corroborate the CI's tip.<sup>1</sup>

First, in November, 2003, the affiants received a tip from the CI. The CI stated that, over the past two months, he overheard the defendant say that he is selling "large amounts of good quality" cocaine. The CI watched the defendant enter and exit the residence at 1229 Clover Lane, Chester, Pennsylvania, on a daily basis for the past six months. The affidavit also contains information relating to the CI's reliability based on his prior dealings with law enforcement.

Second, Officer Tyler attempted to corroborate the tip provided by the CI. On December 8, 2003, Officer Tyler went to 1229 Clover Lane and retrieved the trash that was placed "at curbside" for trash collection. Officer Tyler found the

---

<sup>1</sup> A large part of the affidavit attempted to establish that the person referred to by the CI was the defendant. The defendant does not dispute that the affidavit adequately made the connection so the Court will not describe here the affidavit's attempt to do so.

following items in the trash: (1) one piece of paper containing several number figures; (2) one piece of mail addressed to Ms. Linda Johnson at 1229 Clover Lane, Chester, Pennsylvania; (3) one large clear plastic freezer bag with "weed" residue; (4) one clear plastic wrapper and tape package with a large amount of white powder residue.

As to this last piece of evidence, Officer Tyler recognized the package as consistent with packaging for one-half kilogram of cocaine. Officer Tyler field tested the package and received a positive reaction for cocaine.

The affidavit also describes the affiants' experience and training in the field of narcotics investigations. The affidavit states that drug traffickers (1) engage in a preparation process prior to distributing the controlled substance at a dwelling that is under their control, and (2) store their drug supply and other drug paraphernalia at a dwelling that is under their control because it provides security from police, competing drug traffickers, and/or drug users.

There is insufficient evidence in the affidavit to believe that there were probably drugs in Mr. Johnson's house on the date of the affidavit. The affidavit is dated December 8, 2003. The affiant states that at some time during the month of November, he overheard the defendant state, at some time during the previous two months, that he was selling large amounts of

good quality cocaine. The affidavit does not specify when in November the conversation took place or when in the two months before that the defendant said he was selling large amounts of cocaine. The information from the CI, therefore, is stale in the context of selling drugs. There is no basis to conclude that someone who sold drugs three months ago has drugs in his home today. But cf. United States v. Ninety-two Thousand Four Hundred Twenty-two Dollars and Fifty-seven Cents, 307 F.3d 137, 148 (3d Cir. 2002) (finding that an 11-month gap did not render information in the affidavit stale where items to be seized were business records, created for the purpose of preservation).

The police did not do any surveillance prior to the search in order to confirm or deny the alleged drug dealing. The only thing the police did was "retrieve the trash that was placed at curbside for local trash collection." Among the trash was a clear plastic wrapper with cocaine residue as well as an identifying piece of mail for 1229 Clover Lane. The Court, however, cannot tell from the affidavit whether the trash was in one particular bag or whether the police retrieved the trash from a trash can that was available to other people for trash disposal. Nor is there any evidence as to when the trash was placed there, whether there was trash from other properties in the container, the level of foot traffic in the area, or how the trash can or items arrived at the curb. If the cocaine residue

had been found in a bag that had the identifying information from 1229, that would have been much better evidence of probable cause than what is in this affidavit.

Finding that the warrant was not supported by probable cause does not end the Court's inquiry. Under the good faith exception to the exclusionary rule, "suppression of evidence is inappropriate when an officer executes a search in objectively reasonable reliance on a warrant's authority." Id. at 145 (internal quotations and citations omitted). To determine the applicability of the good faith exception, the Court must ask "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Id. at 145-46 (internal quotations and citations omitted).

The Court of Appeals has identified four situations in which an officer's reliance on a warrant is not reasonable:

- (1) when the magistrate judge issued the warrant in reliance on a deliberately or recklessly false affidavit;
- (2) when the magistrate judge abandoned his judicial role and failed to perform his neutral and detached function;
- (3) when 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) when the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized.

Id. at 146

In this case, the defendant relies on the third situation; he contends that the affidavit was so lacking in indicia of probable cause that the officers who executed the warrant should have realized that it was invalid. To fall within this exception, the defendant must show that the magistrate judge's error in issuing the warrant was so obvious that a law enforcement officer, without legal training, should have realized that the warrant was invalid. Id.

The Court cannot conclude that the defendant has met his burden here. The main problem with the affidavit is that one cannot tell from the affidavit when these various conversations between the police and the CI and between the CI and the defendant took place. It does not appear, however, that the police were trying to cover up stale information. It appears that they were trying to protect the identity of the CI by not being too specific. That is not a justification for a finding of probable cause but it does factor into an analysis of whether a reasonable law enforcement officer would have realized that the warrant was invalid.

The same considerations apply to the trash pull. The drug and identification items could have been taken from the same trash bag. The problem with the affidavit is that it is not as detailed about the trash pull as it should have been. Again, the Court does not think that the police were trying to put something over on the magistrate. I conclude that they acted at all times

in the good faith belief that they had probable cause. I cannot find that that belief was objectively unreasonable.

B. Search of the Vehicle

The government justifies the search of the vehicle on the ground that the defendant consented to the search. The government may undertake a search without a warrant or probable cause if an individual consents to the search. See Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Consent to search must be voluntarily given; it cannot be the product of duress or coercion. Id. at 223, 227. The government bears the burden of establishing, by a preponderance of the evidence, that consent was voluntary in light of the surrounding circumstances. United States v. Sebetich, 776 F.2d 412, 424 (3d Cir. 1985).

In determining voluntariness, the Court must assess the totality of the circumstances, without giving dispositive effect to any one factor. Schneckloth, 412 U.S. at 226-27. Some of the factors that courts often consider include: the defendant's age, education, and intelligence; whether the officers told the defendant that he could refuse to consent; whether the defendant was informed of his constitutional rights; the length of the encounter; whether the police threatened, physically intimidated, or punished the defendant; whether the police made promises or misrepresentations; whether the defendant was in custody or under arrest when consent was given; and whether the consent occurred

in a public or a secluded place. Schneckloth, 412 U.S. at 226-27; United States v. Escobar, 389 F.3d 781, 785 (8th Cir. 2004).

In his original motion to suppress, the defendant argued that his consent was not voluntary because the officers threatened to lock up members of his family if he did not consent to the search of his car and an additional residence. In the defendant's post-hearing memorandum, he does not raise this argument. In any event, the Court accepts Officer Tyler's testimony at the suppression hearing that he did not threaten any member of the defendant's family.

In both his initial motion to suppress and post-hearing memorandum, the defendant argues that his consent was not voluntary because after he stated that he could not give consent to search the vehicle because it did not belong to him, Officer Tyler advised the defendant that he could give consent because Officer Tyler had seen the defendant driving the vehicle for the preceding six months. The defendant also argues that he was in a highly emotional state because his home was already searched, he was in custody, and he was under arrest.

The government does not dispute that Officer Tyler told the defendant that he could give consent to search the vehicle because it was under his control and he had been seen operating it. The government argues that, in the totality of the circumstances, the defendant's consent was voluntary.

The Court finds Officer Tyler's testimony concerning the officers' encounter with the defendant credible. Officer Tyler testified that, when he asked the defendant for consent to search the vehicle, the defendant stated that he was unable to give consent because the vehicle did not belong to him. Officer Tyler testified: "And I told him, that's okay. You don't have to be the owner. I've personally seen you drive that vehicle and operate the vehicle on a daily basis for the past six months, that he had control of the vehicle and he was able to - that he would be allowed to give the consent, if he wanted to." Tr. at 17-18.

The defendant analogizes this situation to that addressed by the Eighth Circuit in United States v. Escobar. In Escobar, law enforcement officers approached two traveling companions in a bus terminal after the officers' suspicions were aroused by large padlocks on the individuals' luggage. 389 F.3d at 783. The officers lied to the individuals, stating that a drug-detection dog had alerted on the luggage. Id. When the officers asked for consent to search the luggage, the first individual responded, "Go ahead" and the second individual said, "Go ahead, you're going to do it anyway. Just go ahead and search." Id. at 783, 786. In response to this statement, the officer told the individual that he did not have to consent to the search. Id. at 783. The search of the luggage uncovered in

excess of five kilograms of cocaine, and the individuals were arrested. Id.

The district court subsequently granted the individuals' motion to suppress the evidence on the ground that the officers lacked a reasonable articulable suspicion to justify detaining the bags, and the consent to search the bags was not freely and voluntarily given. Id. at 784. The Eighth Circuit affirmed the district court's decision based on the fact that the officers misrepresented that a drug dog had alerted on the luggage, as well as factors relating to the location of the search and the officers' failure to advise the first individual of her right to refuse consent. Id. at 786. The court found that the officers' false statement that a drug dog had already alerted on the luggage conveyed a message that compliance was required. Id.

The Third Circuit has likewise concluded that officers may not convey an impression that the individual has no choice but to consent. Sebetich, 776 F.2d at 425. In Sebetich, the Court of Appeals expressed concern about statements by law enforcement officers suggesting that acquiring a warrant would be a foregone conclusion. Id. The court noted, however, that a statement by the officer that he would attempt to obtain a warrant would "stand on a different footing" because the representation would not constitute deceit or trickery but would be a "fair and sensible appraisal of the realities" facing the

individual. Id. (internal quotations and citations omitted). The Court of Appeals reserved judgment on the issue because the district court did not make findings of fact sufficient to allow appellate review. Id. at 424.

The Court finds this situation distinguishable from the facts in Escobar. Here, the officers did not lie to the defendant, and they did not attempt to deceive or trick him. In contrast, Officer Tyler made a brief, truthful statement in response to the defendant's comment that he could not consent because the car did not belong to him. Although the Court must consider the effect of Officer Tyler's statement on the defendant, the Court must ultimately decide whether the defendant's consent was voluntary based on the totality of the circumstances, without giving dispositive effect to any single criterion.

The Court finds that, at the time the defendant gave consent, some of the surrounding circumstances weigh in favor of the defendant's position that his consent was not voluntary. The Court finds that: the defendant was alone in the kitchen of his residence with three armed officers; the officers informed the defendant that they had already searched the residence and that they had discovered drugs, drug paraphernalia, and a weapon; the evidence was displayed on the table in the kitchen; the officers told the defendant that he was under arrest; the defendant was concerned about the welfare of his younger sisters who were

present in the home; and the officers did not inform the defendant that he had the right to refuse consent.

On the other side, however, the Court finds no suggestion that the defendant's age, intelligence, or education limited his ability to consent; the officers were polite and courteous throughout the encounter; the officers complied with the defendant's request not to handcuff him because his younger sisters were present in the home; the officers did not threaten the defendant and they did not make any promises or offer any inducement in connection with his consent; the officers did not suggest that they could get a warrant if the defendant refused consent; the officers' weapons were holstered; the officers did not engage in prolonged or repeated questioning of the defendant; the officers informed the defendant of his Miranda rights; and the whole encounter was relatively short, lasting only several minutes.

In light of all the circumstances, the Court finds that the defendant voluntarily consented to the search.

C. Statements By the Defendant

The defendant moves to suppress statements that he made to the police following his arrest arguing that the waiver of his Miranda rights was invalid and that the statements were the fruit of the illegal search and arrest on December 9, 2003. The Court has held above that the search and arrest of the defendant was

not illegal. The Court holds that the defendant validly waived his Miranda rights. Officer Tyler fully informed the defendant of his rights and the defendant waived the rights. The waiver was voluntary for the same reasons that the consent to search the car was voluntary.

An appropriate order follows.

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

UNITED STATES OF AMERICA           :       CRIMINAL ACTION  
  :       :  
  :       :  
  :       :  
  :       :  
HASAN JOHNSON                       :       NO. 04-372

ORDER

AND NOW, this 18<sup>th</sup> day of January, 2005, upon consideration of the defendant's motion to suppress statements pursuant to the Fifth Amendment (Docket No. 25), the defendant's motion to suppress physical evidence and statements (Docket No. 26), the government's response thereto, the government's supplemental response in opposition, the defendant's post-hearing memorandum in support of the defendant's motion to suppress, and after an evidentiary hearing held on October 22, 2004, IT IS HEREBY ORDERED that said motion is DENIED for the reasons stated in a memorandum of today's date.

BY THE COURT:

/s/ Mary A. McLaughlin  
MARY A. McLAUGHLIN, J.