

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

UNITED STATES :
 :
 v. : CRIMINAL No. 05-CR-134
 :
 DARRYL K. BARNES :

MEMORANDUM

Padova, J.

August _____, 2005

On March 9, 2005, Defendant Darryl K. Barnes was charged in a four-count Indictment with possession of more than 50 grams cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Count I); possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count II); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count III); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count IV). Presently before the Court is Defendant's "Motion to Suppress Physical Evidence and Incriminating Statements" (Doc. No. 30). For the reasons that follow, said Motion is denied.

I. BACKGROUND

The following facts are undisputed. On January 14, 2005, Philadelphia Police Officer Timothy Bogan received an anonymous tip that Defendant was selling cocaine and/or cocaine base from his vehicle, a 2001 Oldsmobile, and two houses located at 2722 Oakford Street and 2625 Manton Street in Philadelphia. The source informed Officer Bogan that buyers would purchase drugs from Defendant at 2722 Oakford Street by knocking on the back door of the house,

while they would knock on the front door of 2625 Manton Street and then wait across the street to complete the transaction.

On January 20, 2005, Officer Bogan and his partner, Philadelphia Police Officer Deborah Palmer-Long, met with a confidential informant ("CI") and enlisted him to make a series of controlled narcotics purchases from Defendant. Later that same day, the Officers conducted surveillance in the area of 27th and Federal Streets in Philadelphia when they saw Defendant's 2001 Oldsmobile arrive on the scene, and observed Defendant exiting the vehicle. The Officers watched as the CI approached Defendant and handed him \$20 in prerecorded buy money in exchange for two orange tinted packets. The packets were later determined to contain cocaine base.

On February 1, 2005, Officers Bogan and Palmer-Long located Defendant's Oldsmobile on the 2700 block of Oakford Street, and observed Defendant exit the residence at 2722 Oakford Street to retrieve an item from the trunk of his vehicle. The Officers gave the CI prerecorded buy money, and watched as the CI knocked on the back door of the house at 2722 Oakford Street, was admitted by Defendant, and stepped out of the house after approximately 30 seconds with a single clear packet. The packet was later determined to contain cocaine base.

On February 2, 2005, Officers Bogan and Palmer-Long again observed the Oldsmobile on the 2700 block of Oakford Street, and

used the same CI to conduct another controlled buy. The CI knocked on the back door of the house, was admitted by an unknown black male, and returned approximately 30 seconds later with two clear packets which were later determined to contain cocaine base.

On February 7, 2005, Officers Bogan and Palmer-Long observed Defendant's Oldsmobile on the 2600 block of Manton Street, and provided the CI with prerecorded buy money to execute a drug purchase from Defendant at the 2625 Manton Street residence. When the CI arrived at 2625 Manton Street, Defendant was standing in front of the house and had just completed a transaction with an unidentified black male. The CI then handed Defendant \$20 in prerecorded buy money, and received a single clear packet that was later determined to contain cocaine base. Upon completion of the drug transaction, Defendant entered the residence at 2625 Manton Street.

Based on the evidence they had gathered, Police Officers Bogan and Palmer-Long applied for a search warrant for the Oakford and Manton Street residences. The affidavit supporting the search warrant stated that Officer Bogan had "received information from a concerned citizen . . . via anonymous phone call that . . . [Defendant] sold crack/cocaine from his vehicle which was a 2001 Oldsmobile . . . as well as 2 houses one at 2722 Oakford St. and the other at 2625 Manton St." (Mot. Ex. A at 3.) The warrant further noted that "the way buyers would purchase at Manton St.

would be if the vehicle is at 2600 Manton St. you could knock on the front door and wait across the street." (Id.) The affidavit further detailed the controlled drug buys executed by the CI under the direction of Officers Bogan and Palmer-Long, and stated that the affiant believed that illegal narcotics were being stored and distributed from inside the 2722 Oakford and 2625 Manton Street residences. On February 8, 2005, a Pennsylvania state judge approved the request and issued a warrant for the Oakford and Manton Street residences.

The next day, on February 9, 2005 at approximately 2:20pm, Officer Bogan and other members of the Philadelphia police force executed the search warrant on the residence at 2625 Manton Street. Defendant and his girlfriend, Ativa Gardner, were present during the execution of the warrant. During the search, the Officers recovered a packet of cocaine base from the sofa where Defendant had been seated, \$318 and two cellphones from Defendant's person, as well as a loaded 9mm handgun, three magazines, approximately 125 grams of powder cocaine, and an additional \$7,871 from a safe in the basement. The Officers also recovered 116 grams of cocaine base from the kitchen of the residence, two scales, two pots, and two spoons, all of which contained cocaine residue, and numerous unused packets. In the instant Motion, Defendant argues that all physical evidence seized and all incriminating statements made by him during the execution of the search warrant should be suppressed

because the search warrant was not supported by probable cause and the Officers failed to properly knock and announce their presence.

II. LEGAL STANDARD

Under the Fourth Amendment, the government must obtain a warrant prior to searching areas in which an individual possesses a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 360 (1967); United States v. Herrold, 962 F.2d 1131, 1136-37 (3d Cir. 1992). It is well-established that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, 445 U.S. 573, 590 (1980)); see also Sharrar v. Felsing, 128 F.3d 810, 819 (3d Cir. 1997). A search warrant, in turn, may only be issued if there is probable cause to believe that evidence of criminal activity will be found on the premises or person to be searched. United States v. Harris, 482 F.2d 1115, 1119 (3d Cir. 1973). The Defendant bears the burden of establishing by a preponderance of the evidence that his Fourth Amendment rights were violated. United States v. Acosta, 965 F.2d 1248, 1257 n.9 (3d Cir. 1992).

III. DISCUSSION

Defendant argues that all physical evidence seized and incriminating statements made by him during the search of the 2625 Manton Street residence should be suppressed because the affidavit accompanying the warrant did not establish probable cause to search

that house. Defendant argues that the information provided by the anonymous source alone is insufficiently reliable to establish probable cause, and that the police did not adequately corroborate the source's information. The Government, in turn, argues not only that the affidavit accompanying the search warrant established the requisite probable cause, but also that even if the warrant was improperly issued, the evidence seized during the search of the 2625 Manton Street premises should not be suppressed because the police in good faith relied on a facially valid search warrant. Defendant counters that even if the police officers were able to legally search the 2625 Manton Street premises, the physical evidence and statements received during that search must be suppressed because the police officers executing the search warrant failed to comply with the constitutionally mandated knock-and-announce procedures.

A. Probable Cause Supporting Issuance of Warrant

Defendant first argues that the 2625 Manton Street search was unconstitutional because the search warrant was not supported by probable cause. It is well established that before issuing a search warrant, the state or magistrate 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). The issuing judge's determination that probable cause existed is to be accorded great deference. Id. at 236; see also

United States v. Conley, 4 F.3d 1200, 1205-06 (3d Cir. 1993). Accordingly, “[a] reviewing court must determine only that the [issuing] judge had a ‘substantial basis’ for concluding that probable cause existed to uphold the warrant.” United States v. Whitner, 219 F.3d 289, 296 (3d Cir. 2000). In making this determination, the reviewing court may consider only “the facts that were before the magistrate judge, i.e., the affidavit, and not consider information from other portions of the record.” United States v. Jones, 994 F.2d 1051, 1055 (3d Cir. 1993). The warrant’s supporting affidavit must be considered as a whole and read in a common sense and nontechnical manner. United States v. Williams, 124 F.3d 411, 420 (3d Cir. 1997).

Defendant argues that the affidavit submitted in support of the warrant application did not establish probable cause to issue a warrant for the 2625 Manton Street premises because the information provided by the anonymous “concerned citizen” alone contained insufficient indicia of reliability, and the police officers did not adequately corroborate the anonymous tip. The Government does not dispute that the information provided by the anonymous source alone does not support a determination of probable cause. The Government argues, however, that the police officers gathered sufficient corroborating information, and that the truthfulness of other information provided by the anonymous source reasonably permitted the issuing judge to conclude that the

information relevant to the 2625 Manton Street premises was reliable as well.

It is well-settled that an anonymous tip of drug-dealing that provides only readily observable information is insufficient to support probable cause because "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." Alabama v. White, 496 U.S. 325, 329 (1990). Such tips therefore require "corroboration through other sources of information [which] reduce[] the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay." Gates, 462 U.S. at 244 (internal quotations omitted).

Defendant argues that the police officers did not sufficiently corroborate the information provided by the anonymous source with regard to Defendant's activities at 2625 Manton Street. Specifically, Defendant argues that while the anonymous source had stated that buyers would purchase drugs from Defendant at 2625 Manton Street by knocking on the front door of the residence and waiting across the street, the officers observed the CI purchasing drugs from Defendant directly in front of 2625 Manton Street, without previously having knocked on the front door of the residence or having waited across the street. Defendant argues that the police officers' observations, therefore, did not establish any connection sufficient to permit the issuance of a search warrant between himself and the 2625 Manton Street

residence. Moreover, Defendant argues that a finding of probable cause is not supported by the fact that he entered the 2625 Manton Street premises after completing the drug transaction with the CI, because he could have just been visiting a friend or relative and there was no reason to believe that evidence of criminal activity would be found there.

In response, the Government argues that the police officers sufficiently corroborated the information provided by the anonymous source. The Government notes that, as the anonymous source had predicted, the CI was able to purchase drugs from Defendant in front of the 2625 Manton Street residence when Defendant's vehicle was parked on the 2600 block of Manton Street. Moreover, the Government stresses that Defendant did enter the Manton Street premises immediately after completing the drug transaction with the CI, which corroborates the anonymous source's allegations that Defendant sold drugs from the 2625 Manton Street residence. Finally, the Government argues that previous controlled buys executed by the CI on behalf of the police officers fully corroborated all other information received from the anonymous source, which allowed the issuing judge to conclude that the source's information regarding Defendant's drug dealing activities from the 2625 Manton Street residence was equally truthful.

It is well-established that the veracity of some assertions made by an anonymous source can "indicate[], albeit not with

certainty, that the informant's other assertions also were true. 'Because an informant is right about some things, he is more probably right about other facts.'" Gates, 462 U.S. at 244 (quoting Spinelli v. United States, 393 U.S. 410, 427 (1969) (White, J., concurring)). Here, the police officers established that most of the anonymous source's allegations were correct. The anonymous source had truthfully alleged that Defendant was a drug dealer, that he drove a 2001 Oldsmobile, that he sold drugs from his vehicle and from 2722 Oakford Street, and that buyers would purchase drugs from 2722 Oakford Street by knocking on the back door of that property. The anonymous source also accurately predicted that buyers could purchase drugs from the Defendant at the Manton Street residence when his Oldsmobile was parked at the 2600 block of Manton Street.

This information provided a sufficient basis for the state judge to conclude that, had Defendant not been engaged in another transaction outside the house at the time the CI approached 2625 Manton Street, the controlled buy would have been executed in the manner described by the anonymous source. Moreover, the fact that the police officers observed Defendant enter the 2625 Manton Street residence immediately after completing the drug transaction with the CI is consistent with the anonymous source's allegation that Defendant dealt drugs from the 2625 Manton Street residence. This, together with all of the anonymous source's other corroborated

allegations, is sufficient to establish a fair probability that the "concerned citizen's" allegations with respect to 2625 Manton Street were truthful, and that evidence of Defendant's drug dealing would be found at the Manton Street residence. The state judge issuing the search warrant, therefore, had a "'substantial basis' for concluding that probable cause existed." Whitner, 219 F.3d at 296. Accordingly, the Court concludes that the issuance of a search warrant for the 2625 Manton Street residence did not violate Defendant's Fourth Amendment rights.¹

¹ Even if the state judge had not had a substantial basis for concluding that probable cause existed to search the 2625 Manton Street premises, the Court finds that the police officers nonetheless acted in good faith reliance on a facially valid search warrant. Evidence that is seized pursuant to a search warrant issued without probable cause may nonetheless be admissible if the warrant is facially valid and the police officers executing the search relied on it in objective good faith. United States v. Leon, 468 U.S. 897, 922 (1984). "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness, . . . for a warrant issued by a magistrate [or state judge] normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." Id. The United States Court of Appeals for the Third Circuit (the "Third Circuit") has concluded that an officer's reliance on a facially valid warrant is unreasonable only in the following four narrow situations:

- (1) when the [issuing] 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.

United States v. Ninety-Two Thousand Four Hundred Twenty-Two

B. Knock and Announce Procedure

Defendant argues that, even if the officers had probable cause to search of the 2625 Manton Street residence, the physical evidence and incriminating statements received as a result thereof must nonetheless be suppressed because the police officers executing the search warrant failed to properly knock and announce their presence before entering. It is well-established that “[t]he ‘commonlaw requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry’ is incorporated into the Fourth Amendment’s guarantees.” Kornegay v. Cottingham, 120 F.3d 392, 396 (3d Cir. 1997) (quoting Richard v. Wisconsin, 520 U.S. 385, 387 (1997)). Here, the Government contends that the police officers executing the search warrant fully complied with the knock and announce requirement before entering the 2625 Manton Street residence.

During the hearing held on June 22, 2005, Officer Bogan testified as follows. On February 9, 2005, Officer Bogan together

Dollars, 307 F.3d 137, 146 (3d Cir. 2002) (quoting United States v. Williams, 3 F.3d 69, 74 n.4 (3d Cir. 1993)).

Here, Defendant argues only that the affidavit accompanying the search warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. The Court finds, however, that even if the facts on which the warrant was based were insufficient to establish a substantial basis for concluding that probable cause existed, the search warrant was not “based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” Id. (internal quotation omitted).

with Police Officer Brian Dietz and "a rough count of maybe five (5) additional officers," executed the search warrant for 2625 Manton Street. (06/22/2005 N.T. at 84). All of the police officers involved in executing the search warrant were wearing plain clothes and black ballistic vests which stated "POLICE" in white letters on the front and back. (Id. at 84, 109.) Prior to entering the residence, Officer Dietz, who was carrying a ram at the time, knocked on the screen door and announced their presence, indicating that they were going to execute a search warrant. (Id. at 86, 107.) Officer Dietz's announcement was loud enough that Officer Bogan heard it from approximately twenty-five feet away, where he was standing at the time. (Id. at 107.) After Officer Dietz, who is "heavy-handed" and "knocks hard," had banged against the screen door several times, another police officer opened the screen door for him, and Officer Dietz proceeded to knock on the storm door. (Id. at 108). Ten to fifteen seconds later, Officer Dietz entered the residence. (Id.)

Officer Bogan's account was confirmed in all material respects by Officer Dietz's testimony. According to Officer Dietz, he was carrying a ram when he approached the 2625 Manton Street residence and banged on the screen door, announcing the presence of police officers and their intent to carry out a search warrant on the property. (06/23/2005 N.T. at 3-4.) He then vigorously "banged" on the inside door several times, again announcing "Police, search

warrant," when the door breached open. (Id. at 4.) Through the breached door, Officer Dietz saw Defendant sitting on a couch in the corner of the room, and observed that Defendant's hand was "in between the couch," leading Officer Dietz to belief that Defendant was reaching for a weapon. (Id. at 4-5.) Upon this perceived threat, Officer Dietz immediately entered the residence, approached Defendant, and subdued and handcuffed him. (Id. at 5.) Officer Dietz further testified that all officers were wearing plain clothes and black ballistic vests with "POLICE" in large white letters on the front and back. (Id. at 6-7.)

The Court notes that Defendant submitted the testimony of six additional eyewitnesses, all of whom testified that the police officers did not knock and announce their presence before entering the residence. However, these six eyewitnesses had significantly different accounts of the events surrounding the search. For example, the first witness testified that only three police officers had executed the search warrant, one of whom was black and the other two of whom were white. (Id. at 33.) The second witness testified that four police officers, all of whom were white, had entered the 2625 Manton Street residence. (Id. at 43.) The third witness was not able to give any specifics about the police officers, but stated that he believed "about" two or three officers entered the residence. (Id. at 57.) The fourth witness testified that two police officers had entered the residence, both of whom

were white. (Id. at 67.) The fifth witness recalled that three police officers had entered the residence, two of whom were black and one of whom was white. (Id. at 83.) Finally, the sixth witness, Ativa Gardner, recalled that "two or three" police officers entered the residence, two of whom were white and one of whom was black. (Id. at 105.)

Similarly, some of those witnesses testified that the police officers had simply turned the door knob and walked in to the 2625 Manton Street residence (id. at 28, 40), while one witness recalled that the officers had run into the house (id. at 50), and yet another witness stated that one of the police officers had kicked the door in to gain entry. (Id. at 70.) Moreover, the Court notes that only Ativa Gardner, who was seated on the couch in the living room of the 2625 Manton Street residence watching television, was within the close vicinity of the door of the residence at the time the police officers arrived. The first witness was watching the events from across the street while looking out of her front window (id. at 26); the second witness was on the street about six houses away (id. at 38); the third witness was observing the events through the side view mirror of his vehicle (id. at 52); the fourth witness was on the street a couple of houses away from 2625 Manton Street (id. at 64); and the fifth witness was standing in her own doorway five or six rowhouses down the road. (Id. at 80.) Given the inconsistencies among the testimony of these witnesses as well

as the fact that none of them with the exception of Ativa Gardner were within the immediate vicinity of the entrance to 2625 Manton Street residence, the Court rejects the testimony of these witnesses as unreliable. The Court further discredits the substantially uncorroborated testimony of Ativa Gardner in favor of the testimony offered by Officers Dietz and Bolden. Accordingly, the Court finds that the police officers who executed the 2625 Manton Street search warrant properly knocked and announced their presence.

Defendant further argues that even if the police officers properly knocked and announced their presence, they did not wait for a sufficiently long period of time before entering the residence. The standards bearing on when officers can legitimately enter after knocking are the same as those for requiring or dispensing with knocking and announcing in the first place. United States v. Banks, 540 U.S. 31, 35 (2003). While the question of whether police actors have acted reasonably under the Fourth Amendment is "a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case," there are some "factual considerations of unusual . . . significance." Id. at 36.

Here, Officer Bogan testified that Officer Dietz entered the 2625 Manton Street residence ten to fifteen seconds after first knocking on the inside door. (06/22/2005 N.T. at 108.) Officer

Dietz testified that after several knocks, the door breached open and he could see Defendant sitting on the couch, reaching in between the couch with his hand. (06/23/2005 N.T. at 4.) Officer Dietz, who believed that Defendant was reaching for a weapon, thereafter immediately entered the residence to subdue and handcuff Defendant. (Id. at 5.) The Court finds that Officer Dietz reasonably believed that he was in immediate danger of physical harm, and that he would have placed himself and others in physical peril had he waited any longer prior to entering the residence. C/f Kornegay, 120 F.3d at 197 (officers may dispense with knocking and announcing their presence if "announcement might place the officers in physical peril").

Accordingly, the Court concludes that the police officers did not violate Defendant's Fourth Amendment rights when they entered the 2625 Manton Street residence immediately after Officer Dietz observed Defendant reaching in between the couch on which he was seated.

IV. CONCLUSION

As the Court concludes that Defendant's Fourth Amendment rights were not violated by the issuance of a search warrant for 2625 Manton Street or the police officers' execution thereof, Defendant's "Motion to Suppress Physical Evidence and Incriminating Statements" is denied.

An appropriate Order follows.

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

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 v. : CRIMINAL No. 05-CR-134
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 DARRYL K. BARNES :

O R D E R

AND NOW, this _____ day of August, 2005, upon consideration of Defendant's "Motion to Suppress Physical Evidence and Incriminating Statements" (Doc. No. 30), Defendant's *pro se* "Supplemental Amendment to the Defendants [sic] Motion on Violation of 'Knock and Announce Rule'" (Doc. No. 60), the Government's submission received in response thereto, and the hearing held on June 22 and 23, 2005, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.