

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	
<b>KENNETH WELCH</b>	:	<b>No. 05-618-1</b>

**MEMORANDUM AND ORDER**

GENE E.K. PRATTER, J.

JANUARY 9, 2007

**I. BACKGROUND**

The Government has charged co-Defendants Kenneth Welch and John Saybolt with conspiracy to submit false, fictitious, or fraudulent claims in violation of 18 U.S.C. § 286, and for making and presenting false or fictitious claims for tax refunds in violation of 18 U.S.C. § 287. Presently before the Court is Defendant Welch’s Motion to Suppress Title III Warrants, Search Warrants and Identifications (Docket No. 21). After a hearing on the merits of the Motion, Defendant Welch conceded that the Government did not employ Title III Warrants in connection with its investigation of Mr. Welch, therefore this portion of his Motion is moot. For the reasons set forth below, the Court will decline to suppress the remainder of the evidence Mr. Welch seeks to prevent the Government from introducing at trial.

**II. SEARCH WARRANT**

Defendant Welch first argues that his rights protected by the Fourth Amendment to the United States Constitution were violated upon an unconstitutional search of his residence, and therefore all evidence obtained as a result of the search should be suppressed. In early 2004, after the Government applied for and received a search warrant from a magistrate, agents conducted a search of Mr. Welch’s residence in Springfield, Massachusetts. Defendant Welch contends that this search warrant was issued without probable cause. He argues that the affidavit supporting the warrant contained

false information and excluded material information, and, furthermore, that the warrant affiant, IRS Special Agent Brian Royds, either purposely or recklessly misconstrued and/or omitted this information.

Special Agent Royds' sworn affidavit detailed, in twenty-five numbered paragraphs, the affiant's background and the Government's investigation up to that point in time. (Govt.'s Resp. Ex. 1.) In particular, Special Agent Royds provided the following details in his affidavit: information recovered from the prior search of Co-Defendant John Saybolt's residence; information gained from an interview with Eric Maier, an admitted participant in the alleged conspiracy who agreed to cooperate with the Government; summaries of consensually taped phone calls between Mr. Maier and Mr. Welch; and statements that telephone calls occurred between Co-Defendants Welch and Saybolt. Id. Mr. Welch argues that Special Agent Royds both misconstrued the telephone conversations between Messrs. Maier and Welch and failed to supply the magistrate with some type of further information, which actions, he alleges, caused the magistrate to find probable cause where none existed.

The Court exercises only a deferential review of the initial probable cause determination made by a magistrate. United States v. Conley, 4 F.3d 1200, 1205 (3d Cir. 1993) (citing Illinois v. Gates, 462 U.S. 213, 236 (1983)). The task of a magistrate issuing a search warrant is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, 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. (quoting Gates, 462 U.S. at 238). The task faced by this Court is to ensure that the magistrate had a "'substantial basis for...conclud[ing]' that probable cause existed." Id. (quoting Gates, 462 U.S. at 238).

Upon allegations of false statements and/or omissions in warrant affidavits, the Court adheres to the procedure set forth in Franks v. Delaware, 438 U.S. 154, 155-156 (1978), in which the Supreme Court held that a criminal defendant has the right to challenge the truthfulness of factual statements made in an affidavit of probable cause supporting a warrant, subsequent to the issuance of the warrant. To overcome the general presumption that an affidavit of probable cause supporting a search warrant is valid, a defendant must first make a “substantial preliminary showing” that the affidavit contained a false statement or omitted material information, which statement or omission was made knowingly or with reckless disregard for the truth, and which information was material to the finding of probable cause. Franks, 438 U.S. at 171.<sup>1</sup>

Defendant Welch has failed to carry his burden to surpass even the preliminary threshold. In order to make the preliminary showing, a defendant cannot rest on mere conclusory allegations of false statements in an affidavit, or a “mere desire to cross-examine,” but rather must present an offer of proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements from witnesses. United States v. Yusuf, 461 F.3d 374, 383 (3d Cir. 2006) (citing Franks, 438 U.S. at 171). Notwithstanding repeated invitations by the Court to do so, Mr. Welch has failed to offer evidence that demonstrates that the affiant inaccurately summarized the information contained in the transcripts of the Maier-Welch telephone calls, or that the affiant omitted information which would tend to defeat probable cause if included in the affidavit supporting the warrant application.<sup>2</sup>

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<sup>1</sup>While a warrant issued by a magistrate usually suffices to establish that probable cause was properly determined, and that law enforcement officers may properly rely on the warrant, where the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit, law enforcement is not entitled to rely on the validity of the warrant and a search may be unconstitutional. United States v. Williams, 3 F.3d 69, 74 n.4 (3d Cir. 1993) (citing Franks, 438 U.S. 154 (1978)).

<sup>2</sup>To the extent that Defendant Welch additionally argues that it was erroneous for the magistrate to make a determination of probable cause in the absence of a holistic review of the actual transcripts of the telephone calls, this argument must fail. The Government had no

### III. IN-COURT IDENTIFICATION

Defendant Welch next argues that the anticipated in-court identification of Mr. Welch by a Government witness, William Engelberger, must be suppressed. Mr. Engelberger is a Charles Schwab customer service representative who identified Mr. Welch after Special Agent Royds showed him a single drivers' license photograph of Mr. Welch as part of the Government's investigation in January 2004. Mr. Welch argues that showing Mr. Engelberger a single photograph of Mr. Welch during the investigation impermissibly tainted any future in-court identification. After extensive questioning and cross-examination of Mr. Engelberger during an evidentiary hearing, the Court is satisfied that Mr. Engelberger's identification of the Defendant is reliable and admissible at trial.

An identification procedure that is both unnecessarily suggestive and creates a substantial risk of misidentification violates due process. Manson v. Brathwaite, 432 U.S. 98, 107 (1977). Unnecessary suggestiveness "contains two component parts: that concerning the suggestiveness of the identification, and that concerning whether there was some good reason for the failure to resort to less suggestive procedures." United States v. Brownlee, 454 F.3d 131, 137 (3d Cir. 2006) (quoting United States v. Stevens, 935 F.2d 1380, 1389 (3d Cir. 1991)).

The display of the single photograph of Mr. Welch to Mr. Engelberger may have suggested that the authorities believed Mr. Welch to be connected to the crime which they investigated. However, the Government has shown that Special Agent Royds had good reason, or at the very least, a benign motive, for showing just a single photograph to Mr. Engelberger. The agents assigned to this investigation traveled to Springfield, Massachusetts to execute a search of Mr. Welch's residence. (Govt.'s Resp. 11.) Unexpectedly, they arrived in Springfield during business hours, and discovered that the Charles Schwab office they planned visit as part

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affirmative obligation to produce the transcripts, and it is the province of the magistrate to determine whether probable cause exists based on the totality of the circumstances. Gates, 462 U.S. at 238.

of their investigation was just across the street from where the investigators gathered to discuss the search of Mr. Welch's residence. Id. The agents decided to use the extra time to talk to employees of Schwab about the account had been opened at the branch with an IRS refund check issued to David Labreque, a check the Government believed to be connected to the conspiracy they were investigating. Id. Seriatim, the investigators began by showing a photograph of Mr. Welch, asking each of the present employees if he knew the man in the photograph, which was a copy of Mr. Welch's drivers' license. Id. When each said that he did, they asked how he knew the person; Mr. Engelberger recalled the man in the photograph in connection with the Schwab account the agents investigated. Id.

The necessity of law enforcement to zero in quickly on a suspect in a crime can justify the usually suggestive methodology of presenting one single photograph to potential witnesses. United States v. Milhollan, 599 F.2d 518, 523 (3d Cir. 1979). Moreover, a "suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability," since reliability is the "linchpin in determining the admissibility of identification testimony." Brathwaite, 432 U.S. at 106; United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995); United States v. Wilkins, 2000 WL 1345935, at \*2 (4th Cir. Sept. 19, 2000) ("[e]ven assuming, without deciding, that showing a single photograph is impermissibly suggestive," the issue is whether the identification is nevertheless reliable).

The Government has proven that under the totality of the circumstances Mr. Engelberger's anticipated in-court identification is reliable and is not the result of a tainted process. Mr. Engelberger testified under oath that he met with the man he identified as Mr. Welch in a well-lit room, one-on-one, for a period of five to ten minutes. He also testified that as a customer service representative, his job training provided him with the skill and appreciation for the importance to make eye-contact with customers and to pay attention to and make efforts

to remember individuals whom he served. Mr. Engelberger testified that he paid specific attention to each of the several individuals who came in to inquire about the particular account relevant to this matter, since it was flagged by Charles Schwab as suspicious. Finally, Mr. Engelberger testified that to an absolute certainty, he could identify Mr. Welch as the man who attempted certain transactions at Charles Schwab. He was entirely unequivocal on his ability to identify the Defendant without reliance on the photograph. See, e.g., Neil v. Biggers 409 U.S. 188, 199-200 (1972) (totality of the circumstances includes: (i) the witness's opportunity to observe the defendant at the time of the crime; (ii) the witness's degree of attention at the time of the crime; (iii) the accuracy of the witness's initial description; (iv) the level of certainty demonstrated by the witness when viewing the defendant at the identification procedure; and (v) the length of time between the crime and the identification procedure.) The Court will permit this witness to proceed to trial and to be asked if he can identify Mr. Welch.

#### **IV. CONCLUSION**

For the reasons set forth herein, the evidence obtained by the Government will not be suppressed due to any alleged defect in the search warrant, and the Court will allow the Government to present in-court identification testimony. An appropriate Order follows.

BY THE COURT:

/s/ Honorable Gene E.K. Pratter  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

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**ORDER**

**AND NOW**, this 9<sup>th</sup> day of January 2007, after a hearing on January 3, 2007 to consider Defendant Kenneth Welch's Motion to Suppress Title III Warrants, Search Warrants and Identifications (Docket No. 21), and the Government's Response thereto (Docket No. 37), the Court finds Defendant's Motion to Suppress evidence obtained as a result of Title III Warrants **MOOT** insofar as the Government informed Mr. Welch that no Title III warrants were issued in connection with its investigation of Mr. Welch. Further, **IT IS HEREBY ORDERED** that:

- (1) Defendant's Motion, as related to suppression of, *inter alia*, the various items and information seized as a result of the search warrant issued to search Mr. Welch's dwelling, and any information obtained by the Government derived therefrom, is **DENIED**; and
- (2) Defendant's Motion, as related to suppression of the identification of Mr. Welch, is **DENIED**.

BY THE COURT:

/s/ Honorable Gene E.K. Pratter  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE