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

GENE BARTHOLOMEW and ROBIN BARTHOLOMEW	: :	CIVIL ACTION
v.		
COMMONWEALTH OF PENNSYLVANIA OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL, FINANCIAL INVESTIGATION UNIT AND AGENT SCOTT L. FRALEY	: : : : : :	NO. 97-5684

O'Neill, J. June , 1999

MEMORANDUM

Plaintiffs Gene and Robin Bartholomew bring suit against defendants Agent Scott Fraley and the Office of Attorney General pursuant to 42 U.S.C. § 1983 for alleged violations of plaintiffs' rights under the Fourth Amendment.[1] They also assert a claim against both defendants under 42 U.S.C. § 1985(3) alleging a conspiracy to deprive plaintiffs of their constitutional rights.

Presently before me are defendants' motion for summary judgment and plaintiffs' response thereto.[2] For the reasons discussed below, I will grant judgment for Agent Fraley both as to the claim alleging that the search warrants at issue failed to provide probable cause and as to the conspiracy claim. I will also dismiss all claims against the Office of Attorney General. With respect to the claim against Agent Fraley alleging that the warrants violated the Fourth Amendment's particularity requirement, however, I will deny the motion for summary judgment.

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[1] Though the complaint names "the Commonwealth of Pennsylvania, Office of Attorney General, Bureau of Narcotics Investigation and Drug Control, Financial Investigation Unit" as the second defendant, it is thereafter referred to as the Office of Attorney General.

[2] While defendants' motion is designated as one for summary judgement, with respect to Counts II and III defendants seem to be contending that plaintiffs state no viable claims against them. I therefore find that with respect to those counts the motion is really in the nature of a motion to dismiss for failure to state a claim upon which relief can be granted and will thus treat it as such. See Aldahonda-Rivera v. Parke Davis & Co., 882 F.2d 590, 591 (1st Cir.1989) ("it is well established that a party's choice of a label for [a] motion is not controlling... and that a Rule 12(b)(6) motion to dismiss can be transformed by the court into a motion for summary judgment under Rule 56, (and vice versa)...."), citing C. Wright, A. Miller & M. Kane, 10 Federal Practice & Procedure § 2713 (1983).

I.

Plaintiffs Gene and Robin Bartholomew own and operate a retail music business in Allentown, Pennsylvania known as Toones Records. In March of 1994, Gene Bartholomew and Toones Records became the subject of a criminal investigation initiated by the Office of Attorney General. This investigation was subsequently submitted to the statewide investigating grand jury.

On the morning of September 11, 1995, agents of the Office of Attorney General conducted searches of both Toones Records and the Bartholomews' residence pursuant to warrants issued by the Honorable G. Thomas Gates. At the request of Deputy Attorney General Letty Kress and Agent Scott Fraley both the list of items to be seized and the affidavit of probable cause had been sealed by the court. The warrants thus read "see Exhibit A sealed by Order of the Court" where the items to be seized were to be identified and "see Exhibit B sealed by Order of the Court" where reference was made to the affidavit of probable cause.

Agent Fraley was the affiant for both warrants. He participated in the search of Toones Records but was not present for the search of the Bartholomews' home. At all times relevant to this action, Agent Fraley was a duly authorized agent and employee of the Office of Attorney General acting in his official capacity under color of state law.

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgement must state the basis for its motion and identify those portions of the record which it believes indicate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the burden of persuasion at trial, it may properly support its motion merely by showing that there is an absence of evidence to support the non-moving party's case. Id. at 325.

In response to a properly supported motion for summary judgment, the non-moving party must point to specific facts demonstrating that a genuine issue for trial exists. Fed. R. Civ. P. 56(e). It may not rest upon unsupported allegations or denials. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). In order to demonstrate the existence of a genuine issue of material fact, the non-moving party must raise more than a "mere scintilla of evidence;" it must produce evidence on which a jury could reasonably find in its favor. Id. at 248, 252.

When considering a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-moving party. Id. at 255. Moreover, a court may not consider the credibility or weight of the evidence in making its determination. Id.

Government officials engaged in discretionary functions are entitled to qualified immunity from suit under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). If a defendant asserts qualified immunity in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997). "Only if the plaintiff carries this initial burden must the defendant then demonstrate that no

genuine issue of material fact remains as to the 'objective reasonableness' of the defendant's belief in the lawfulness of his actions." Id.

III.

In Count I of the complaint, plaintiffs allege two separate Fourth Amendment violations against Agent Scott Fraley.[3] They allege that: (1) the search warrants in question did not provide probable cause and therefore were improperly issued by Judge Gates; and (2) Agent Fraley "[made] application for the said search warrants without particularly describing and identifying specifically the property or things to be seized." Since the undisputed facts show that the warrant application did contain a particularized list of items to be seized but that this list was sealed at the request of both Deputy Attorney General Kress and Agent Fraley, I construe plaintiffs' second claim to allege that the warrants, as issued, violated the Fourth Amendment's particularity requirement. In response to these allegations, Agent Fraley contends that his affidavit provided probable cause to issue the warrants and that even if the searches of Toones Records and the Bartholomews' residence did violate the Fourth Amendment, he is entitled to qualified immunity.

The Fourth Amendment states, in material part, that "no warrants shall issue but upon probable cause . . . and particularly describing . . . the things to be seized." U.S. Const. amend. IV. Probable cause exists to support the issuance of a search warrant if, based on a totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Where a search is conducted pursuant to a warrant, a plaintiff who challenges that search for lack of probable cause must show that the warrant application "is so lacking in indicia of probable cause as to render official belief in its existence improper." Malley v. Briggs, 475 U.S. 335, 344-45 (1986). Alternatively, a plaintiff must demonstrate that the issuing magistrate's probable cause determination was based on a false affidavit in which the affiant "either stated a deliberate falsehood or acted with a reckless disregard for the truth." Lippay v. Christos, 996 F.2d 1490, 1500- 1501 (3d Cir.1993), citing Franks v. Delaware, 438 U.S. 154, 171 (1978).

In the present action, plaintiffs do not offer any evidence which would support a finding that the warrant applications at issue lacked sufficient indicia of probable cause.[4] They also fail to offer

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[3] The Fourteenth Amendment extends the provisions of the Fourth Amendment to searches and seizures by state officers. Vernonia School Dist. v. Acton, 515 U.S. 646, 652 (1995).

[4] The only factual allegations made by plaintiffs which relate to the affidavit are either irrelevant to the issue of probable cause or unsupported by the record. Plaintiffs allege that the affidavit: (1) fails to point to any evidence of drug distribution or money laundering by plaintiffs and (2) lacks information regarding the amount of tax allegedly owned. Though allegations of drug distribution and money laundering had led to the initial investigation of Gene Bartholomew, these allegations were not the subject of Agent Fraley's warrant application and are therefore irrelevant. The warrants at issue here authorized the search and seizure of evidence concerning possible violations of state tax laws. Plaintiff's allegation that the affidavit lacks information regarding the amount of tax allegedly owed is simply untrue. The affidavit contains information

any evidence that Agent Fraley stated a deliberate falsehood or acted with a reckless disregard of the truth in his affidavit. In other words, plaintiffs do not point to any specific facts which show that there is any genuine issue for trial. Accordingly, I will grant Agent Fraley's motion for summary judgment with respect to plaintiffs' claim that the search warrants did not provide probable cause.

By requiring that search warrants particularly describe the "things to be seized", the Fourth Amendment prohibits a "'general, exploratory rummaging in a person's belongings.'" Anderson v. Maryland, 427 U.S. 463, 480 (1976), quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The particularity requirement serves two goals: (1) to limit the discretion of the officers executing the warrant and (2) to inform the person subject to the search of what can be seized. United States v. McGrew, 122 F.3d 847, 850 (9th Cir. 1997); Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987); In the Matter of the Application of Lafayette Academy, 610 F.2d 1, 5 (1st Cir. 1979); United Stated v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970). The terms of a search warrant must be read in context and not in isolation in order to determine whether the warrant is sufficiently specific. United States v. Conley, 4 F.3d 1200, 1208 (3d Cir. 1993).

Here, it is undisputed that the list of items to be seized was sealed by Judge Gates and that the warrants therefore failed to identify those items. Accordingly, I find that the warrants lacked sufficient particularity under the Fourth Amendment and that plaintiffs have therefore carried their initial burden of showing that Agent Fraley's conduct violated a clearly established constitutional right. I must therefore consider whether any factual issues remain regarding the objective reasonableness of Agent Fraley's belief in the lawfulness of his actions.

Given the "great deference" accorded a magistrate's determination that a warrant has been properly issued, United States v. Leon, 468 U.S. 897, 914 (1984), "[s]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness."[5] Id. at 922, quoting Illinois v. Gates, 462 U.S. 213, 267 (1983). However, "a warrant may be so facially deficient --i.e., in failing to particularize the place to be searched or the things to be seized-- that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923; cf. Massachusetts v. Sheppard, 468 U.S. 981, 989-90 (1984) (discussing when an officer's reliance on a warrant subsequently determined to be invalid is objectively reasonable.)[6] Accordingly, I must determine whether the defects in the

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concerning both the amount of non-taxable sales being reported by Toones Records and the apparent lack of any legitimate source, such as a mail order catalogue, for non-taxable sales.

[5] The same standard of objective reasonableness applied in the context of a suppression hearing in Leon defines the qualified immunity accorded an officer whose request for a warrant allegedly led to an unconstitutional search. Malley v. Briggs, 475 U.S. 335, 344 (1986).

[6] Sheppard involved an analysis of the good faith exception to the exclusionary rule. As here, the warrant failed to describe the items to be seized with sufficient particularity. The Court stated that:

> we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and action, that the warrant he possesses authorizes him to conduct the search he has requested. . . . If an officer is required to accept at face value the judge's conclusion that a warrant form is invalid, there is little reason

warrants were so glaring that a reasonable officer would have known that they were illegal despite a magistrate's authorization. In the present case, however, just how glaring the defects in the warrants were remains at issue. The record does not show what measures, if any, were taken both to limit the discretion of the officer's conducting the searches and to inform plaintiffs of what could be seized. Since I find that genuine issues of material fact exist regarding the objective reasonableness of Agent Fraley's reliance upon the warrant, I will deny the motion for summary judgment with respect to this claim.

In Count II plaintiffs allege various § 1983 claims against the Office of Attorney General. These claims are barred as a matter of law. States are not "persons" within the meaning of 42 U.S.C. § 1983 and, therefore, cannot be held liable for violations of that statute. Wills v. Michigan Dept. of State Police, 491 U.S. 58, 66 (1989). "Since Congress expressed no intention of disturbing the states' sovereign immunity in enacting § 1983, these suits, when brought against a state, are barred by the Eleventh Amendment." Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 697 (3d Cir. 1996), citing Wills, 491 U.S. at 58. Count II of the complaint will therefore be dismissed.

Count III asserts a claim against both defendants under 42 U.S.C. § 1985(3) for allegedly conspiring to deprive plaintiffs of their constitutional rights. To sustain this cause of action, plaintiffs must prove the existence of a conspiracy among "two or more persons." Plaintiffs, however, have failed to allege such a conspiracy. A governmental organization cannot, as a matter of law, conspire with its own agents or employees since they are considered a single legal entity. Hull v. Cuyahoga Valley Bd. Of Educ., 926 F.2d 505, 509-10 (6th Cir. 1991); Zombro v. Baltimore City Police Dept., 868 F.2d 1364, 1371 (4th Cir. 1989), cert. denied, 493 U.S. 850 (1989). Accordingly, the Office of Attorney General cannot conspire with Agent Fraley, its agent and employee. Since plaintiffs fail to allege a conspiracy among two or more persons, Count III will be dismissed.

Finally, plaintiffs also make reference to alleged violations of the Pennsylvania Constitution and Pennsylvania Rules of Criminal Procedure as part of their § 1983 claims.[7] Violations of state law, however, are simply not actionable under 42 U.S.C. § 1983. Giuffre v. Bissell, 31 F.3d 1241, 125 7(3d Cir. 1994). Any § 1983 claims for alleged violations of Pennsylvania law will therefore be dismissed.

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why he should be expected to disregard assurances that everything is all right. Sheppard, 468 U.S. at 989-90 (footnote omitted). The Court concluded that although "an error of constitutional dimensions may have been committed with respect to the issuance of the warrant, . . . it was the judge, not the police officers, who made the critical mistake." Id.

[7] Plaintiffs do not appear to raise independent state law claims in their complaint. In Counts I and II under the heading "Violation of 42 U.S.C. § 1983" they allege that both defendants "deprived the Bartholomews of their right to be free from unreasonable searches and seizures, as guaranteed and protected under the Fourth Amendment to the United States Constitution, Article I § 8 of the Pennsylvania Constitution, and Pennsylvania Rule of Criminal Procedure 2005(b), in violation of 42 U.S.C. § 1983." Compl. ¶¶ 34, 35, 36, 37.

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ORDER

AND NOW this day of June, 1999, upon consideration of defendants' motion and plaintiffs' response thereto, it is hereby ORDERED that the motions are GRANTED IN PART and DENIED IN PART:

(1) Judgement is entered in favor of defendant Scott Fraley and against plaintiffs Gene and Robin Bartholomew with respect to the claim that the search warrants at issue did not provide probable cause;

(2) Counts II and III of plaintiff's complaint are DISMISSED;

(3) Any claims pursuant to 42 U.S.C. § 1983 for alleged violations of state law are DISMISSED; and

(4) defendant Scott Fraley's motion for summary judgment with respect to the claim that the search warrants at issue violated the Fourth Amendment's particularity requirement is DENIED.

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THOMAS N. O'NEILL, JR J.