

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA)
)
v.) Criminal Action No. 7:13CR00059-001
)
SAMUEL LEWIS FENNELL,) **MEMORANDUM OPINION**
)
Defendant.) By: Hon. Glen E. Conrad
) Chief United States District Judge

This case is presently before the court on the motion to suppress filed by the defendant, Samuel Lewis Fennell. For the reasons set forth below, the motion will be granted in part and denied in part.

Background

Quinton Germaine Tyree, a resident of Greensboro, North Carolina, was the primary target of an investigation by the Roanoke, Virginia Office of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). As part of the investigation, ATF agents arranged for a confidential source to make a controlled purchase of a trafficking amount of cocaine from Tyree in Roanoke on July 1, 2013. The agents contacted Detective Dwayne James of the Greensboro Police Department and requested surveillance assistance from the department's Vice and Narcotics Division.

While surveilling Tyree on July 1, 2013, Detective James observed Tyree exit Tyree's residence and drive to a townhome complex at 5719 Bramblegate Drive in Greensboro. Tyree parked beside a blue Pontiac minivan and entered Unit E. He stayed in the townhome a brief period of time and then returned to his residence. Shortly thereafter, Tyree and a female

companion left his residence in separate vehicles and drove to Roanoke, where they were pulled over by investigators while en route to the distribution location. A trafficking amount of cocaine was found in the female's vehicle.

During a subsequent interview, Tyree advised investigators that he had picked up the cocaine from the townhome on Bramblegate Drive, and that his source of supply's name was Sam. By that point, Detective James had run the tags on the minivan parked outside the townhome and learned that the vehicle was registered to the defendant, Samuel Fennell. Detective James shared this information with the ATF agents, and he and other members of the Vice and Narcotics Division proceeded to further investigate Fennell. They discovered that Fennell had a prior federal drug conviction.

At approximately 8:30 a.m. on July 3, 2013, Detective Eric Goodykoontz of the Greensboro Police Department and his partner drove by Fennell's townhome and saw the minivan parked outside. They shared this information with Detective James, who directed them to begin conducting surveillance. Detective James requested additional surveillance assistance from Lieutenant Thomas Kroh, Detective Patrena Caviness, and Detective Steve Hollers. While the other officers conducted surveillance, Detective James began preparing a search warrant application for Fennell's residence.

Just after 9:00 a.m., Fennell left the townhome complex in the minivan. Detective Goodykoontz followed him to a nearby gas station and then onto Interstate 40, where Detective Goodykoontz assumed a position that was approximately 100 to 150 feet behind the minivan. Detective Goodykoontz then began to pace the minivan, and determined that Fennell was driving

approximately 75 miles per hour in a 65 mile per hour zone. He notified Officer Brad Wood and Corporal James Barber of the speed estimation and requested that they stop the vehicle.

Officer Wood initiated the traffic stop at approximately 9:24 a.m. Shortly thereafter, Corporal Barber arrived on the scene with his drug-detection dog. Corporal Barber spoke to Fennell while Officer Wood ran Fennell's identification and registration information through dispatch and prepared a warning ticket. As Officer Wood explained the warning ticket to Fennell, Corporal Barber walked the dog around the minivan, and the dog alerted to the vehicle's passenger side. Corporal Barber asked Fennell whether there would be any reason for the dog to alert to the presence of narcotics. In response, Fennell stated that he had a personal amount of marijuana in the minivan.

During a subsequent search of the vehicle, the officers located a bag containing a penny-sized quantity of marijuana. After the marijuana was found, Fennell was placed in handcuffs. At approximately 9:54 a.m., Officer Wood "let dispatch know that [they] were detaining the suspect based on narcotics." Suppression Hr'g Tr. ("Tr.") at 31, 40.¹

Upon learning that marijuana had been found in the vehicle, Detective Goodykoontz, who had parked nearby to observe the traffic stop, contacted Detective James and shared this information with him. Detective James instructed Detective Goodykoontz to talk to Fennell and to attempt to gain Fennell's "consent and cooperation before going down to the residence." Tr. at 62.

Detective Goodykoontz and his partner traveled to the scene of the traffic stop. Upon their arrival, the detectives introduced themselves to Fennell, explained "what [they] knew about

¹ All references to the suppression hearing transcript throughout this memorandum opinion are to an unedited realtime version provided to the court by the court reporter.

the . . . townhome he had just come from,” and advised him “that there was going to be enough to apply for a search warrant for the residence.” Tr. at 63. Fennell eventually indicated that he would consent to a search of his residence if they showed him a search warrant. He and the officers proceeded to “argue[] back and forth,” with Detective Goodykoontz emphasizing that the officers “wouldn’t need his consent once the search warrant was done.” Tr. at 64.

At some point during the conversation, Fennell asked to speak to Detective James. Detective Goodykoontz initially advised Fennell that Detective James was not available to talk, because he was in the process of getting a search warrant signed. However, Detective Goodykoontz ultimately arranged for Fennell to speak to Detective James over the phone. During the phone conversation, Fennell advised Detective James that he would be willing to cooperate and consent to a search of his residence once he was shown the search warrant. Fennell also indicated that his daughter, Fiuschia Fennell (“Fiuschia”), was staying with him in the townhome, and that he did not want her to “get tangled up in his situation.” Tr. at 181. Detective James advised Fennell that his daughter was not the target of the investigation, and that she would not be charged unless the evidence revealed that she was involved. After Detective James and Fennell “went back and forth for a few seconds on whether [Fennell] was going to give consent,” Detective James advised Detective Goodykoontz that he was going to continue preparing the search warrant application. Tr. at 181-182.

Detective James completed the application for a search warrant for Fennell’s residence at approximately 10:30 a.m. In an attached affidavit, Detective James provided the following information:

During the month of June 2013, I initiated a narcotics investigation of a known drug trafficker that resides in the Greensboro, NC area. The target of this investigation was suspected of trafficking multiple ounces of cocaine at a time. Within the past 72 hours, members of the Greensboro Police Department Vice and Narcotics Division conducted surveillance on the target at his/her residence.

During a period of surveillance the target was observed leaving his/her residence and traveling to 5719 Bramblegate Rd., Unit E, Greensboro, NC. There the target parked beside a 2001 Pontiac vehicle with Virginia registration XBC-2476. The target was observed going into 5719 Bramblegate Rd., Unit E.

A check of Division of Motor Vehicle records shows that the vehicle is registered to Samuel Lewis Fennell of Roanoke, Va. A check of the ACCURINT database and other data bases show that as recent as June 2013, Samuel Lewis Fennell has had some type of reporting at that address.

After the target had been inside of Unit E for a very short period of time, he was observed exiting and returning back to his/her vehicle then leaving the complex.

Surveillance was maintained where the target traveled back to his/her residence and then left a short time later. When the target left his/her residence on this occasion, he/she was observed traveling towards a distribution location known to be associated with the target.

At this time the target of the investigation was stopped and trafficking amount of suspected cocaine was located. The suspected cocaine was field tested and tested positive for the presence of cocaine.

On July 3, 2013, members of the Greensboro Police Department Vice and Narcotics Division conducted surveillance of 5719 Bramblegate Dr., Unit E.

On this date Fennell was observed exiting Unit E, getting into his Pontiac vehicle and travel to the Sheetz gas station located at the intersection of Guilford College Rd. and Hornaday Rd. After leaving the store, Fennell traveled to I-40 West bound where Officers initiated a traffic stop based on chapter 20 violations.

A K-9 sniff was conducted on the vehicle which resulted in a positive alert. Search of the vehicle, Officers located marijuana in the center console of Fennell's vehicle.

A check of Fennell's FBI history show a number of drug related arrest which includes a Federal drug conviction.

Suppression H'rg Ex. 1.

Detective James presented the search warrant application to Guilford County Superior Court Judge Susan Bray. According to Detective James, in addition to the affidavit, he provided sworn oral testimony regarding the information provided by Tyree. Specifically, Detective James "swore to the fact that [he] had been a part of the interview with Mr. Tyree . . . , and that during that interview, Mr. Tyree gave specific information that on the date of his arrest, he had traveled to Bramblegate Drive, met with Sam and purchased the traffic[king] amount of cocaine that he had been arrested with." Tr. at 187. Detective James also "informed Judge Bray that Mr. Tyree identified Sam as his . . . source of supply of cocaine." Id. During the suppression hearing, Detective James explained that he omitted this information from the affidavit in order to protect Tyree's identity. Judge Bray determined that probable cause existed to issue the search warrant. At 11:05 a.m., she signed the warrant authorizing a search of Fennell's residence.

While Detective James was in the process of obtaining the search warrant, Lieutenant Groh, Detective Caviness, and Detective Hollers continued to maintain surveillance at the townhome complex on Bramblegate Drive. The detectives had been advised of the possible presence of a female in Fennell's townhome. At some point, Detective Hollers saw an individual, who he believed to be male, exit the townhome with a gym bag. The individual "walk[ed] around in the parking lot a little bit, kind of looking around." Tr. at 157. The individual then turned and entered another apartment.

Detective Hollers maintained position and relayed this information to the other officers on the scene, including Lieutenant Kroh, who was supervising the surveillance operation from the back side of the townhome. Fearing that the individual was doing counter-surveillance or that their undercover operation had otherwise been compromised, Lieutenant Kroh radioed the other officers and advised them that the individual needed to be stopped.

The individual in question subsequently exited the second townhome with a male subject and got into a vehicle. At that point, Lieutenant Kroh, who had driven around to the front of the townhome, and the other officers on the scene, stopped the vehicle in the parking lot and placed both occupants in handcuffs.

Lieutenant Kroh first spoke to the male subject on the driver's side of the vehicle, who had exited the second apartment with the individual from Fennell's residence. The subject advised Lieutenant Kroh that he lived in the apartment with his grandmother, and that nothing had been dropped off in the apartment. The officers performed a consensual search of that apartment and found no contraband inside. The officers also confirmed that the gym bag contained no contraband.

Lieutenant Kroh then focused his attention on the first subject, who had been seen leaving Fennell's residence. Lieutenant Kroh advised the individual that the officers were in the process of obtaining a search warrant for the townhome and that they needed to make sure that no one else was inside. Another officer, Corporal Parker, obtained the keys to the apartment from the second subject. Corporal Parker and Lieutenant Kroh subsequently entered the townhome and confirmed that no one else was inside. The officers then brought the individual inside the townhome, where they waited in the living room for Detective James to arrive with the

search warrant. At some point thereafter, the officers learned that the individual was Fennell's daughter, Fiuschia, and they removed her handcuffs. However, she was not "free to leave at that point." Tr. at 152.

Detective James learned of the officers' entry into the townhome when he left the courthouse after obtaining the search warrant. He arrived at Fennell's residence at approximately 11:25 a.m. and read the search warrant to Fiuschia in the living room, where other detectives were standing close by her. Detective James then called the officers who were still with Fennell and asked them to transport him to his residence, rather than the nearby police station as Detective James had originally requested.

Once Fennell arrived at the townhome complex, Detective James went to speak to him in the patrol car. Fennell became very upset upon learning that officers had already entered his residence. Detective James explained the reasons for the initial entry, and provided Fennell a copy of the search warrant to review. By this time, officers had already begun to search Fennell's residence, pursuant to the warrant.

Detective James had Fennell removed from the patrol car and taken into the apartment, where approximately ten officers were located. After briefly speaking to his daughter, Fennell asked to talk to Detective James on the back patio, outside of Fiuschia's presence. At that point, the handcuffs were either removed from Fennell or his hands were cuffed in front of him.

Detectives James, Detective Goodykoontz, and another detective were present for the conversation on the patio. During the conversation, they discussed Fennell's potential cooperation and his concerns regarding his daughter. The detectives noted that "part of that cooperation [would consist of] Fennell advising [the officers] where illegal narcotics would be

inside the residence,” as well as any cash or guns. Tr. at 72. Detective Goodykoontz emphasized that time was of the essence, and that Fennell might lose the opportunity to provide substantial assistance once he was arrested. See Tr. at 74-75 (“[P]art of my conversation with him was . . . that if he wanted to provide substantial assistance to where he didn’t get charged that day, that we needed to know, because he knew as well as we did that if his name gets on paper showing that he’s been arrested, some of his substantial assistance can go out of the window, because people find out he’s been arrested and won’t want to deal with him.”). Detective James advised Fennell that his daughter would not be charged, as long as Fennell agreed to cooperate and the evidence did not suggest that she was directly involved with the cocaine. Detective James and Fennell then went “back and forth” for a while, until Detective James became frustrated and said, “Well, don’t worry. I’ll just go in and we’ll find it. If it is found in an area where she has . . . knowledge, then it’s out of my hands.” Tr. at 193. Detective James rejoined the search efforts, while one of the other detectives remained with Fennell on the patio.

Fennell subsequently asked to speak to Detective James again. Fennell advised Detective James that he wanted to cooperate, and that he did not want his daughter to be charged. At that point, Detective James asked Fennell where the cocaine was located. See Tr. at 195 (“I asked him, okay, where is the cocaine at?”). When Fennell did not respond to his question, Detective James went back inside the townhome. Shortly thereafter, Fennell told another detective that the cocaine was hidden behind the face plate of the dishwasher and that a large sum of currency was hidden in an air vent.

After these items were located, Detective James went back outside to speak to Fennell. Detective James advised him that he would not be arrested that day, that the investigation involved agents from the ATF office in Roanoke, and that it was undetermined whether he would be prosecuted at the federal or state level.

Before leaving the townhome, Detective James spoke to Fennell again. Fennell indicated that he wanted to cooperate and that he could provide information about his source of supply that could further the investigation. Detective James advised Fennell that he had spoken to ATF agents in Roanoke, and that the agents had indicated that Fennell was part of a drug conspiracy that involved anywhere from twenty to forty kilograms of cocaine. Fennell reiterated his concerns for his daughter, and indicated that he wanted to cooperate but did not want to provide information in his daughter's presence. Detective James suggested that they go to the nearby police substation on Swing Road, to which Fennell agreed.

Detective James called for a patrol unit to transport Fennell to the substation. The patrol unit arrived at 12:43 p.m. Approximately ten minutes later, Detective James and Detective Caviness arrived at the substation and met with Fennell in one of the interview rooms. During the interview, Fennell provided information regarding his source of supply. The interview lasted just under one hour. Fennell was not handcuffed during the interview. At the conclusion of the interview, a patrol unit transported Fennell back to his residence. He was not advised of his Miranda² rights at any point that day.

On August 15, 2013, Fennell, Tyree, and four other individuals were charged in a multi-count indictment. On February 20, 2014, a grand jury returned a superseding indictment against

² Miranda v. Arizona, 384 U.S. 436 (1966).

the defendants. Count One charges Fennell, Tyree, and Grier Gracin with conspiring to distribute, and possess with intent to distribute, five kilograms or more of a mixture or substance containing cocaine and 280 grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 846.

On January 14, 2014, Fennell filed the instant motion to suppress, arguing that the search warrant for his residence was not supported by probable cause, and that he was interrogated in violation of his rights under the Fifth Amendment. The court held a suppression hearing on April 3, 2014, during which it heard testimony from Officer Wood, Corporal Barber, Detective Goodykoontz, Lieutenant Kroh, Detective Caviness, Detective Hollers, Detective James, and Fiuschia Fennell. At the conclusion of the hearing, the parties were directed to submit supplemental briefs in support of their respective positions. Those briefs have been filed and the matter is ripe for review.

Discussion

I. The search warrant for Fennell's residence

Fennell first claims that the warrant authorizing officers to search his residence was invalid because the supporting affidavit failed to provide probable cause to believe that narcotics would be found inside his residence. While the court agrees that the affidavit alone was insufficient to establish probable cause, the court concludes that Detective James' sworn statements to the state court judge, coupled with the affidavit, sufficiently supported Judge Bray's probable cause finding. The court further concludes that the detective conducted the

search in good faith reliance on the warrant, and that Fennell is not entitled to a Franks³ hearing challenging the validity of the search warrant affidavit.

“[T]he Fourth Amendment provides the only proper standard for determining whether evidence seized by state officials pursuant to a state warrant is admissible in federal court,” and, thus, the court need not consider whether a state officer violated state law in securing probative evidence.⁴ United States v. Clyburn, 24 F.3d 613, 616-17 (4th Cir. 1994). The Warrant Clause of the Fourth Amendment “does not require that the basis for probable cause be established in a written affidavit; it merely requires that the information provided [to] the issuing [official] be supported by ‘Oath or affirmation.’” Id. at 617 (quoting U.S. Const. amend. IV). “Moreover, the Amendment does not ‘require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit.’” Id. (quoting United States v. Shields, 978 F.2d 943, 946 (6th Cir. 1992)). Accordingly, “sworn, unrecorded oral testimony” may be considered in determining whether probable cause existed to support the issuance of a state search warrant. Id. The issuing official’s probable cause determination should be afforded “great deference,” and should be disturbed only upon a finding, based on the

³ Franks v. Delaware, 438 U.S. 154 (1978).

⁴ In North Carolina, “the issuing official may examine on oath the applicant [for the search warrant] . . . , but information other than that contained in the [search warrant] affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.” N.C. Gen. Stat. § 15A-245. Consequently, if North Carolina law controlled the court’s inquiry here, the court could consider Detective James’ sworn statements only if they were recorded or summarized in writing by Judge Bray. See, e.g., State v. Teasley, 346 S.E.2d 227, 231 (N.C. Ct. App. 1986) (“[T]he evidence here does not show that the magistrate recorded or contemporaneously summarized in the record Officer Lawing’s statement to her that he had observed some white powder which he believed to be cocaine. The magistrate’s additional information thus was not recorded as required by N.C. Gen. Stat. 15A-245(a). Accordingly, under our statutory requirements the issuance of the warrant must rest solely upon Officer Lawing’s affidavit.”).

totality of the circumstances, that there was not a “fair probability” that officers would find contraband in the place to be searched. Id. (quoting Illinois v. Gates, 462 U.S. 213, 233, 238 (1983)).

In challenging the validity of the search warrant for his residence, Fennell focuses his attack on Detective James’ written affidavit, which stated that the target of a narcotics investigation, while under surveillance, was observed leaving his residence and traveling to 5719 Bramblegate Drive, Unit E; that the target entered Unit E for a brief period of time and then returned to his own residence; that the target traveled towards a known distribution location shortly thereafter; that a trafficking amount of cocaine was located when the target was subsequently stopped en route to the distribution location; that 5719 Bramblegate Drive, Unit E was the address of record for Fennell; and that Fennell was the registered owner of a vehicle that the target parked beside in the lot adjacent to Unit E. As summarized above, however, Detective James provided additional sworn statements to Judge Bray, which substantially elaborated on the facts provided in the affidavit. Specifically, Detective James testified that he was present when the target, Quinton Tyree, was interviewed on July 1, 2013 following the traffic stop; that Tyree indicated during the interview that he had traveled to Bramblegate Drive that day and purchased the trafficking amount of cocaine from an individual named Sam; and that Tyree identified Sam as his source of supply of cocaine. The court is convinced that these additional facts established a “fair probability” that illegal narcotics would be found in Fennell’s residence on Bramblegate Drive, and accordingly supported Judge Bray’s finding of probable cause. Clyburn, 24 F.3d at 618 (quoting Gates, 462 U.S. at 238).

Moreover, even if the search warrant for Fennell's residence was somehow defective, the court is of the opinion that Detective James could have relied in good faith upon the warrant. Under the good faith exception, adopted by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984), evidence obtained from an invalid search warrant will not be suppressed if the officer's reliance on the warrant was "objectively reasonable." United States v. Perez, 393 F.3d 457, 461 (4th Cir. 2004) (citing Leon, 468 U.S. at 922). "Usually, searches conducted 'pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a [judicial official] normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.'" Id. (quoting Leon, 468 U.S. at 922). Under Leon, however, reliance on a warrant is not objectively reasonable if: (1) the issuing judge "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the issuing judge "wholly abandoned his judicial role"; (3) the "affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) the "warrant [is] 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." Id. (quoting Leon, 468 U.S. at 923).

In arguing that the good faith exception should not apply in the instant case, Fennell again focuses on Detective James' written affidavit, arguing that it is so "bare bones" that no reasonable officer would have believed that it was sufficient to establish probable cause. Def.'s Supp. Br. at 10. Under existing precedent, however, reviewing courts are not limited to the information contained within the four corners of an affidavit when determining whether an

officer's reliance on a warrant was objectively reasonable. See United States v. McKenzie-Gude, 671 F.3d 452, 459 (4th Cir. 2011); Perez, 393 F.3d at 462; United States v. Legg, 18 F.3d 240, 243 (4th Cir. 1994). Instead, courts may also properly consider "any contemporaneous oral statements" to the judicial officer responsible for issuing the warrant. Legg, 18 F.3d at 243.

Here, for the reasons set forth above, the court is convinced that Detective James' oral statements to Judge Bray, considered in conjunction with his written affidavit, suffice to establish objectively reasonable reliance on the search warrant. Accordingly, because the officers possessed an objectively reasonable belief that the warrant was valid, they were lawfully present in Fennell's residence during the execution of the warrant. Id. at 244.

In the supplemental brief filed in support of his motion to suppress, Fennell alternatively argues that a Franks hearing is required. In Franks, the Supreme Court instructed that

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Franks, 438 U.S. at 155-56. If the defendant is able to establish the "allegation of perjury or reckless disregard . . . and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided . . ." Id. at 156.

In this case, Fennell contends that the warrant affidavit omitted material facts rather than included false ones. He claims that the affidavit should have disclosed that the target did not carry anything out of Fennell's residence; that the target was stopped hours after leaving Fennell's residence; that the cocaine was found in a separate vehicle driven by the target's

girlfriend that was also stopped en route to the planned distribution location; that only a very small amount of marijuana was found in Fennell's minivan after the drug-detection dog alerted to the vehicle; and that Fennell's prior drug conviction was from a number of years ago.

“To satisfy the Franks' intentional or reckless falsity requirement for an omission, the defendant must show that facts were omitted with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading.” United States v. Tate, 524 F.3d 449, 455 (4th Cir. 2008) (emphasis in original) (internal quotation marks omitted). “[T]he omission must be designed to mislead or must be made in reckless disregard of whether it would mislead.” Id. Thus, to succeed on his Franks claim, Fennell must

make a substantial preliminary showing that [the detective] omitted material facts that when included would defeat a probable cause showing -- i.e., the omission would have to be necessary to the finding of probable cause -- and that the omission was designed to mislead or was made with reckless disregard of whether it would mislead.

Id. (internal citations and internal quotation marks omitted); see also United States v. Blauvelt, 638 F.3d 281, 289 (4th Cir. 2011).

Applying these principles, the court concludes that Fennell is not entitled to a Franks hearing. In addition to failing to make a sufficient preliminary showing that Detective James intentionally or recklessly omitted facts from the search warrant affidavit, Fennell has failed to demonstrate that the asserted omissions were material to Judge Bray's probable cause determination. Once again, the additional, oral information that Tyree had identified his source of supply as “Sam,” who resided at Fennell's apartment, was more than sufficient to establish the existence of probable cause. Accordingly, the request for a Franks hearing will be denied.

II. Fennell's incriminatory statements

Fennell also argues that he was interrogated in violation of the Fifth Amendment on the day his residence was searched. The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. Statements obtained from a defendant during custodial interrogation are “presumptively compelled” in violation of the Fifth Amendment, unless the government shows that law enforcement officers adequately informed the defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966)⁵ and obtained a waiver of those rights. United States v. Cardwell, 433 F.3d 378, 388-89 (4th Cir. 2005). In this case, it is undisputed that Fennell was not advised of his Miranda rights on the day in question. Accordingly, the court must determine whether Fennell was subjected to custodial interrogation.

In the absence of a formal arrest, a suspect is in custody for Miranda purposes if “his freedom of action is curtailed ‘of the degree associated with a formal arrest.’” United States v. Leshuk, 65 F.3d 1105, 1108 (4th Cir. 1995) (quoting Stansbury v. California, 511 U.S. 318, 322 (1994)). “This inquiry is an objective one, and asks whether ‘a reasonable man in the suspect’s position would have understood his situation’ to be one of custody.” United States v. Hashime, 734 F.3d 278, 282 (4th Cir. 2013) (quoting United States v. Colonna, 511 F.3d 431, 435 (4th Cir. 2007) (internal quotation marks omitted). “In other words, the court considers whether ‘a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.’” Id. (quoting United States v. Jamison, 509 F.3d 623, 628 (4th Cir. 2007) (internal

⁵ Under Miranda, a suspect in custody “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” Miranda, 384 U.S. at 478-79.

citations omitted)). Interrogation, in turn, refers not only to express questioning, but also to words or actions that law enforcement officers “should know are reasonably likely to elicit an incriminating response.” Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Applying these principles, the court concludes that Fennell was placed in custody for purposes of Miranda after the marijuana was found in his vehicle. At that point, Fennell was placed in handcuffs, “detain[ed],” and subsequently advised that he was being investigated for drug trafficking. Tr. at 31. As courts have repeatedly emphasized, “[h]andcuffs are generally recognized as a hallmark of a formal arrest.” United States v. Newton, 369 F.3d 659, 676 (2d Cir. 2004) (citing cases); see also New York v. Quarles, 467 U.S. 649, 655 (1984) (holding that a handcuffed defendant was in custody for purposes of Miranda); United States v. Johnson, 734 F.3d 270, 275-76 (4th Cir. 2013) (emphasizing that “[t]here can be no doubt that Johnson, handcuffed and seated in the back of a police car, was in custody” for Miranda purposes). Thus, a reasonable defendant in Fennell’s position, who was handcuffed and detained after being found in possession of narcotics, “would ordinarily conclude that his detention would not necessarily be temporary or brief and that his movements were now totally under the control of the police -- in other words, that he was restrained to a degree normally associated with formal arrest and, therefore, in custody.” Newton, 369 F.3d at 676. Indeed, the officers who were present at the traffic stop, and who testified at the suppression hearing, confirmed that Fennell was “in custody . . . [a]t that time,” that he was not free to leave, and that this “would have been obvious to [Fennell] as well.” Tr. at 52, 99.

The court further concludes that Fennell remained in custody, for Miranda purposes, after he was transported to his residence. It is undisputed that multiple officers were present for the

execution of the search warrant, and the government's own evidence suggests that Fennell may have been handcuffed for the duration of the search. See Tr. at 71 ("He was handcuffed until we got on the back patio. Then I believe he was unhandcuffed or [the handcuffs were] placed . . . in front of him."). Even if the handcuffs were ultimately removed, Detective James testified that Fennell was nonetheless "not free to leave," Tr. at 220, and the court is convinced that a reasonable person in Fennell's position, who knew that he was being investigated for drug trafficking, would have shared that belief. See United States v. Cavazos, 668 F.3d 190, 195 (5th Cir. 2012) ("While the handcuffs were removed prior to interrogation, the experience of being singled out and handcuffed would color a reasonable person's perception of the situation and create a reasonable fear that handcuffs could be reapplied at any time."); United States v. Bengivenga, 845 F.2d 593, 597 n.16 (5th Cir. 1988) ("The awareness of the person being questioned by an officer that he has become the focal point of the investigation, or that the police already have ample cause to arrest him, may well lead him to conclude, as a reasonable person, that he is not free to leave, [and] that he has been significantly deprived of his freedom") (emphasis and internal citations omitted). While Fennell was eventually advised that he would not be formally arrested that day, it was not until after he had finally confessed to the locations of the cocaine and money. In any event, such a statement "is not 'talismatic' or sufficient in and of itself to show a lack of custody." United States v. Hargrove, 625 F.3d 170, 180 (4th Cir. 2010).

The court further concludes that Fennell was subjected to interrogation while in custody. After Fennell was handcuffed and detained at the scene of the traffic stop, Detective James directed Detective Goodykoontz and other members of the Vice and Narcotics Division to talk to Fennell and attempt to get him to cooperate with the cocaine trafficking investigation. These

detectives then proceeded to advise Fennell of the information that they had learned about him, and that “there was going to be enough to apply for a search warrant for [his] residence.” Tr. at 63. When Fennell initially refused to “acknowledg[e] anything” or consent to a search of his residence, the detectives proceeded to “argue[] back and forth” with him, emphasizing that they would not need his consent once they obtained the search warrant. Tr. at 63-64.

The detectives and Fennell continued to engage in conversation after Fennell was taken to his residence. Aware of Fennell’s concerns regarding Fiuschia’s welfare, Detective James and other detectives insinuated that Fennell would need to cooperate if he wanted to prevent his daughter from being charged, and that part of that cooperation would include advising the detectives where any illegal narcotics or money was located in the residence. The detectives also suggested that Fennell might be formally charged that day if he did not agree to cooperate and that this would likely impede his ability to provide substantial assistance in the future. The detectives continued to converse “back and forth” with Fennell until Detective James became “frustrated” and advised Fennell that the detectives would “just go in and . . . find [the drugs],” and that it would be out of Detective James’ hands as to whether Fiuschia would be charged, if the drugs were found in an area in which she would have had knowledge of them. Tr. at 193. Fennell subsequently indicated that he wanted to cooperate to protect Fiuschia. Without issuing Miranda warnings, Detective James expressly asked him where the cocaine was located. Fennell eventually advised the detectives that the cocaine was hidden behind the face plate of the dishwasher and that a large sum of currency was hidden in an air vent.

On this record, the court is convinced that Fennell's incriminatory statements were not spontaneous or unsolicited, and that they were instead the product of express questioning or conduct that the detectives should have known was reasonably likely to elicit an incriminating response. See Innis, 446 U.S. at 301. While the government argues in its brief in opposition that Fennell's statements at his residence were voluntarily made in an effort to help himself and his daughter, Fennell's right to Miranda warnings attached well before he conversed with the detectives on the patio. See Berkemer v. McCarty, 468 U.S. 420, 440 (1984) ("It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'") (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). Moreover, as evidenced above, the detectives' multiple exchanges with Fennell at his residence were contentious, and the detectives continued to try to extract incriminating information from him during that time. Under these circumstances, it is simply untenable for the government to assert that, after exchanges with officers during a period of custody lasting over two hours, the defendant voluntarily disclosed the locations of the drugs and money. Such utterances cannot be described as spontaneous, unsolicited, or voluntary. See, e.g., United States v. Wright, 991 F.2d 1182, 1186-87 (4th Cir. 1993) (holding that incriminatory statements that a defendant uttered while he was watching his bedroom being searched were voluntary and therefore admissible, since the statements were "unsolicited," unprovoked, and "not made in response to any interrogation").

For these reasons, the court concludes that Fennell's incriminating statements to the detectives were the result of custodial interrogation in violation of his Fifth Amendment rights.

Accordingly, the statements are “presumed involuntary” and must be suppressed.⁶ United States v. Mashburn, 406 F.3d 303, 306 (4th Cir. 2005); see also United States v. Lewis, 466 F. App’x 170, 172-73 (4th Cir. 2012) (“Any incriminating statement made during a custodial interrogation is presumed involuntary and inadmissible unless preceded by Miranda warnings.”).

Conclusion

For the reasons stated, the defendant’s motion to suppress will be granted in part and denied in part. The Clerk is directed to send certified copies of the memorandum opinion and the accompanying order to all counsel of record.

ENTER: This 24th day of April, 2014.

/s/ Glen E. Conrad
Chief United States District Judge

⁶ To the extent there remain unanswered questions as to the practical effect of the suppression, the court is of the opinion that the current record is not sufficiently developed to permit their resolution.

