

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

|                                       |   |                              |
|---------------------------------------|---|------------------------------|
| <b>UNITED STATES OF AMERICA</b>       | ) |                              |
|                                       | ) |                              |
|                                       | ) | Case No. 1:12CR00045         |
|                                       | ) |                              |
| v.                                    | ) | <b>OPINION AND ORDER</b>     |
|                                       | ) |                              |
| <b>COREY BAILEY AND SUSAN BAILEY,</b> | ) | By: James P. Jones           |
|                                       | ) | United States District Judge |
| Defendants.                           | ) |                              |

*Zachary T. Lee, Assistant United States Attorney, Abingdon, Virginia, for United States; Dennis E. Jones, Abingdon, Virginia, for Defendant Corey Bailey; and Helen E. Phillips, Allen, Kopet & Associates, PLLC, Bristol, Virginia, for Defendant Susan Bailey.*

In this criminal case, the defendants have jointly moved to suppress all evidence obtained as a result of a search of their residence pursuant to a warrant obtained from a state judicial officer, which warrant was based upon information provided to police by a confidential informant. In addition, and alternatively, they have moved for an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), at which they would try to show that the officer's affidavit to the magistrate was intentionally false or made with reckless disregard for the truth. *See id.* at 171-72.

For the reasons that follow, the defendants' motions will be denied.<sup>1</sup>

I

The defendants are charged by Indictment with intentionally possessing marihuana with the intent to distribute (Count One); possessing, as principals or as aiders and abettors, a firearm in furtherance of a drug trafficking crime (Count Two); conspiring to manufacture, possess with the intent to distribute, and distribute marihuana (Count Three); and possessing, as principals or as aiders and abettors, certain firearms and ammunition after having been convicted of a felony (Count Four).

The facts, as set forth in the evidence received by the court at the hearing on the defendants' motions, and as contained in the proffers by the defendant, show that on June 27, 2012, at 7:27 p.m., Aaron Hankin, a detective with the Bristol, Virginia, Police Department, applied to a state magistrate for a search warrant for a residence located in the city. The affidavit submitted by the officer to the magistrate stated as follows:

A reliable and confidential informant has seen marijuana being grown and distributed at this location within the past 72 hours.

---

<sup>1</sup> The defendant Susan Bailey filed a Motion for *Franks* Hearing and Motion to Suppress and her codefendant Corey Bailey sought permission to join in those motions, which permission was granted. Following the hearing, Susan Bailey filed a Second Motion to Suppress, which recited that it was "intended to address arguments and testimony presented at the hearing." (Second Mot. Suppress ¶ 1.)

....

... I was advised of the facts set forth in this affidavit in whole or in part, by an informer. This informer's credibility or the reliability of the information may be determined from the following facts:

This informant has provided reliable information in the past. The informant has also successfully completed multiple controlled drug purchases. The informant is familiar with the appearance and packaging of illegal drugs, including marijuana.

(Mot. to Suppress, Ex. 1.) There is no evidence that any further information was supplied to the magistrate concerning the requested warrant.

The magistrate issued a search warrant at 7:38 p.m. on that day, authorizing a search of the residence for “[m]arijuana and other illegal drugs, paraphernalia [sic], items used for the manufacturing of marijuana, records related to the sell [sic] and manufacture of marijuana and any money related to the sell [sic] of illegal drugs. (*Id.*)

Detective Hankin and other police officers executed the search warrant beginning at 9:09 p.m. that evening. In the course of a two- or three-hour search they found a total of 127.2 grams (4.49 ounces) of marijuana, ten Endocet pills, digital scales, two handguns with ammunition, a new “in box grow cabinet” addressed to Susan Bailey, an “open growing system,” and in the basement, what appeared to be a “plant growing light” and multiple pots with fresh potting soil. (*Id.* at Ex. 2.) The defendants were present in the house and were arrested. Corey Bailey told the officers that a bag of marijuana they found belonged to him and

during a later interview at the jail, Susan Bailey told Hankin that she knew about the ammunition, but not about the guns. Corey Bailey stated that he had taken the firearms from his son.

## II

The defendants make three separate contentions relating to the legality of the search of their home. First, they assert that the police officer's affidavit was insufficient to show probable cause for the issuance of the search warrant. Secondly, they contend that even if probable cause was shown, the officers exceeded the scope of the warrant by seizing the two firearms and ammunition. Finally, they argue that in any event, they are entitled to an evidentiary hearing seeking to show that Detective Hankins' material statements in his affidavit to the state magistrate were either false or made with reckless disregard for the truth of the statements. I will address these contentions in order.

## A

The Constitution protects against unreasonable searches and seizures by providing that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. Evidence seized in violation of the Fourth Amendment is subject to suppression by the court through its application of the exclusionary rule, in order "to deter future unlawful police conduct and thereby

effectuate the [constitutional] guarantee.” *United States v. Calandra*, 414 U.S. 338, 347 (1974).

In making a probable cause determination, “[t]he task of the issuing magistrate 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.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). “[G]reat deference” must be afforded by a reviewing court to a judicial officer’s determination of probable cause. *Id.* at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

As the defendants point out, the affidavit in this case is sparse and in their arguments they focus on what they consider to be its missing details. But “[w]hen scrutinizing each line of an affidavit, one could always find some question left unanswered or some issue unresolved,” and instead the affidavit must be “judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.” *United States v. Thomas*, 605 F.3d 300, 309 (6th Cir. 2010) (internal quotation marks and citation omitted). Viewing the circumstances in this case as a totality, and applying them in the required practical, common-sense manner, I find that probable cause did exist for the issuance of the search warrant in question.

In the first place, this is not the case of the police acting on the basis of an anonymous tip, *see United States v. DeQuasie*, 373 F.3d 509, 523 (4th Cir. 2004), or using an informant whose reliability is untested or unknown, *see United States v. Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996). The magistrate here was presented with the sworn statement of a city detective who personally had received information from an informant who he believed to be credible because (1) the informant had previously assisted the police in successful supervised purchases of illegal drugs on a number of occasions and (2) the informant knows what marihuana looks like. The affidavit further stated that this reliable informant had told Detective Hankin that he had seen marihuana being grown and distributed at the Bailey house within the last 72 hours.<sup>2</sup>

In some drug cases like this, information from an informant has been corroborated by police, through a controlled purchase or otherwise, before seeking a search warrant, but “as a general principle, it is not necessary for all tips to be corroborated in order to be considered credible, and whether corroboration is necessary in a given case depends on the particular circumstances of that case.” *United States v. Patterson*, 406 F. App’x 773, 783 (4th Cir.) (unpublished) (citing

---

<sup>2</sup> The defendants do not contend that the information from the informant was impermissibly stale by the time it was presented to the magistrate. Any such lapse of time must be considered along with all of the other facts and circumstances. Much lengthier periods of time have been upheld against attacks for staleness. *See United States v. Wagner*, 989 F.2d 69, 74-75 (2d Cir. 1993) (reviewing cases).

*DeQuasie*, 373 F.3d at 518-19), *cert. denied*, 131 S. Ct. 2893 (2011). In this case, the informant had completed supervised drug buys for the police in the past and thus his reliability was shown in that way.<sup>3</sup>

This is not a case like *United States v. Wilhelm*, 80 F.3d 116, 118 (4th Cir. 1996), in which the court found a lack of probable cause where the officer's affidavit was based upon a single telephone call from an anonymous "concerned citizen" who the officer swore, without any underlying facts, was "a mature person with personal connections with the suspects and [who] has projected a truthfull [sic] demeanor." In the present case, the facts presented, while admittedly limited, justified the magistrate's issuance of the warrant.<sup>4</sup>

## B

Alternatively, the defendants contend that the seizure of the firearms and ammunition by the police was not authorized by the warrant and therefore such evidence must be suppressed.

From the evidence presented at the hearing, it was shown that two pistols, with ammunition, were found by police during the course of their search of the

---

<sup>3</sup> Prior use of an informant to make controlled buys of narcotics "has . . . consistently been held to establish a sufficient track record so as to show the informant's credibility." Wayne R. LaFave, 2 *Search and Seizure: A Treatise on the Fourth Amendment* § 3.3(b) (2012) (citing cases).

<sup>4</sup> The government also argues that the seizure was valid because of the good faith of the officers in executing the warrant. *See United States v. Leon*, 468 U.S. 897, 922 (1984). Because I find that there was probable cause for issuance of the warrant, I need not reach this issue.

residence. One of the firearms, a Taurus .45-caliber pistol, was found above the door frame on the inside of a bedroom closet, along with a loaded magazine. The other, a Hi-Point .40-caliber pistol, was found in a small (12 inches by 8 inches) metal box located under a bed in the room. Two boxes of .45-caliber ammunition were also found in the closet, one of which was in a black bag. In the box with the Hi-Point pistol was a magazine and two partial boxes of ammunition. The metal box was locked and was forced open during the search, along with a number of other locked boxes found in the house.<sup>5</sup>

The Fourth Amendment requires that a warrant “particularly describ[e] . . . the persons or things to be seized.” U.S. Const. amend. IV. It is uncontested that the search warrant here did not authorize the seizure of the firearms or ammunition. However, in certain circumstances, the police may seize evidence in plain view without the authority of a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). To meet this exception, the government must show that “(1) the seizing officer is lawfully present at the place from which the evidence can be plainly viewed; (2) the seizing officer has a lawful right of access to the object itself; and (3) the object’s incriminating character [is] . . . immediately apparent.” *United States v. Williams*, 592 F.3d 511, 521 (4th Cir.) (internal quotation marks and citations omitted) (alterations in original), *cert. denied*, 131 S. Ct. 595 (2010).

---

<sup>5</sup> According to Detective Hankin, the police called the Bristol Fire Department to assist them in opening the locked boxes.

“The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner’s privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy.” *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

Based upon my ruling herein upholding the validity of the warrant, I find that the police officers were lawfully in the Baileys’ home and had the authority to search the places where the firearms and ammunition were found, including the locked box. *See United States v. Smith*, 459 F.3d 1276, 1291 (11th Cir. 2006) (holding that under plain view exception, officers validly opened lockbox containing child pornography, where they were authorized to search residence for illicit drug activity, since “a lockbox could reasonably contain drugs or related paraphernalia”); *United States v. Gamble*, 388 F.3d 74, 76-77 (2d Cir. 2004) (finding valid under plain view exception seizure of ammunition clip discovered in dresser drawer pursuant to search warrant authorizing search of residence for drugs and drug paraphernalia); *United States v. Wolfe*, No. 99-1696, 2000 WL 1562833, at \*8 (6th Cir. Oct. 11, 2000) (unpublished) (holding that under plain view doctrine, police could seize weapons found in hidden basement vault where warrant authorized search of entire residence for documents and items relating to larceny even though warrant did not authorize the search for or seizure of firearms). It was reasonable for the police officers in this case to search the closet

and any locked containers for drugs, drug paraphernalia, drug money and records, as authorized by the warrant. They were thus lawfully in a position to observe, in plain view, the contents of the closet and the locked box. Moreover, because Detective Hankin knew at the time that Corey Bailey was a convicted felon and thus prohibited from possessing firearms and ammunition under state law, the incriminating character of those items was immediately apparent.

Accordingly, I decline to suppress the evidence relating to the firearms and ammunition.

## C

Finally, the defendants seek a *Franks* hearing, which I also deny.

Under certain limited circumstances, a defendant may be permitted to challenge the veracity of the affiant who obtained the search warrant. *Franks*, 438 U.S. at 164. To qualify for a *Franks* hearing, a defendant must

make a substantial preliminary showing that (1) officers knowingly or recklessly made false statements in or omitted facts from an affidavit supporting a search warrant, *and* (2) those false statements or omissions were material, *i.e.*, rendered the affidavit unable to support a probable cause finding. Warrant affidavits carry a presumption of validity, and allegations of negligence or innocent mistake provide an insufficient basis for a hearing.

*United States v. McKenzie-Gude*, 671 F.3d 452, 462 (4th Cir. 2011) (internal quotation marks and citations omitted). Once an accused makes this preliminary showing, she is entitled to a hearing, but whether she will prevail at the hearing “is,

of course, another issue.” *Franks*, 438 U.S. at 172. It is not enough to show that the informant lied to the officer; “[i]nstead, the evidence must show that the officer submitting the complaint perjured himself or acted recklessly because he seriously doubted or had obvious reason to doubt the truth of the allegations.” *United States v. Johnson*, 580 F.3d 666, 670 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1115 (2010).

In support of the request for a *Franks* hearing, Susan Bailey has submitted affidavits of three neighbors who have sworn that they have never seen evidence of drug distribution from Bailey’s home, such as “strange people” visiting the house. She has also submitted the affidavit of a person whose daughter lived with Susan Bailey between July and September of 2012. She visited her daughter at the home at least once a week and never saw drug-related activity.

I do not find these affidavits sufficient to justify a *Franks* hearing. While the information contained therein certainly may be relevant to the defendants’ guilt or innocence of extensive drug dealing, it does not implicate Detective Hankins’ veracity. In other words, the affidavits do not cast doubt on Hankins’ statements in his affidavit concerning the history or reliability of the informant or of the information provided by the informant. There is no evidence that Hankin knew, or should have known, of the observations of these particular neighbors about what went on in the Bailey household. In any event, Hankin did not report the

informant's statement to be that there was extensive drug dealing from the home or an unusual number of visitors there, but only that he had observed manufacturing and distribution of marihuana in the residence. It is likely that persons growing marihuana for sale in their home would keep that information from their law-abiding neighbors.<sup>6</sup>

A *Franks* hearing is not justified in this case.

### III

For these reasons, it is **ORDERED** that the Motion to Suppress (ECF No. 39), the Motion for *Franks* Hearing (ECF No. 40), and the Second Motion to Suppress (ECF No. 51) are DENIED.

ENTER: February 28, 2013

/s/ James P. Jones  
United States District Judge

---

<sup>6</sup> The affidavit of the acquaintance whose daughter lived in the home for several months is inapplicable for an additional reason — she says that she visited between July and September of 2012, *after* the search and resulting arrest of the Baileys, which occurred in June of 2012. It is doubtful that any drug activity would have continued in the home after that date.