

**UNPUBLISHED**

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

**UNITED STATES OF AMERICA,**

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Case No. 1:01CR00032

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v.

)

**OPINION AND ORDER**

**ROBERT N. MOREHEAD,**

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)

By: James P. Jones

Defendant.

)

United States District Judge

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*Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for United States of America; B.L. Conway, Conway Law Firm, P.L.L.C., Abingdon, Virginia, for Defendant.*

In this criminal case, the defendant filed a motion pursuant to Federal Rule of Criminal Procedure 12(b)(3) to suppress evidence seized from his home. An evidentiary hearing was held on the motion on August 24, 2001. This opinion memorializes the decision announced orally at the conclusion of that hearing.

I

On or about August 30, 2000, Special Agent Allen Lilly with the Virginia State Police executed a state search warrant at the home of the defendant, a convicted felon,

resulting in the seizure of several firearms. The defendant was subsequently indicted for possession of a firearm after having been convicted of a felony in violation of 18 U.S.C.A. § 922(g)(1) (West 2000).

In support of his warrant application before a state magistrate, Lilly gave an affidavit in which he stated that a “reliable, confidential informant” had been in the defendant’s home several times over the past two years and had, within the preceding seventy-two hours, seen firearms being “stored” and “possessed” by the defendant. Lilly further stated that the confidential informant’s (“CI”) credibility and reliability had been “established through the process of making a controlled drug buy” and that the CI had “provided reliable information in the past.” (Lilly Aff.)

At the hearing in this court additional facts not presented to the magistrate were shown. For example, between February 15 and March 22 of 2000, this CI made three controlled purchases of narcotics, both prescription and illegal, from this defendant, during which he wore a recording device.<sup>1</sup> On nine other occasions, the CI made controlled buys of similar narcotics from a number of other individuals. The CI was paid \$100 for each felony controlled buy and \$50 for each misdemeanor controlled buy. He also received consideration for leniency as to pending state criminal charges. The CI admitted that he has a history of drug and alcohol abuse and prior criminal conduct.

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<sup>1</sup> Those drugs included oxycontin, hydrocodone, valium, and marijuana.

The defendant seeks the suppression of the firearms recovered from his home. Specifically, he argues that the search warrant, based entirely upon hearsay information from a CI, was not supported by probable cause and thus was in violation of the Fourth Amendment.<sup>2</sup>

## II

The Warrant Clause of the Fourth Amendment requires that warrants: (1) be issued by a neutral and detached magistrate; (2) contain a particular description of the place to be searched and persons or things to be seized; and (3) be based upon probable cause, supported under oath or affirmation. *United States v. Clyburn*, 24 F.3d 613, 617 (4th Cir. 1994).

With respect to this third prong, “[t]he case law of the Fourth Circuit clearly evidences [a] general willingness to affirm, under a highly deferential standard of review, a magistrate’s finding of probable cause.” *Simmons v. Poe*, 47 F.3d 1370, 1378 (4th Cir. 1995).<sup>3</sup> In so doing, I must consider only that information presented

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<sup>2</sup> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” U.S. Const., amend. IV.

<sup>3</sup> Indeed, as the Supreme Court has opined, “[r]easonable minds frequently may differ on the question of whether a particular affidavit establishes probable cause . . .” *United States v. Leon*, 468 U.S. 897, 914 (1984).

before the magistrate, *United States v. Wilhelm*, 80 F.3d 116, 118 (4th Cir. 1996), and may not make my own assessment as to whether probable cause existed. *United States v. Whitner*, 219 F.3d 289, 296 (3d Cir. 2000).

In light of this deferential standard, a magistrate is required “simply to make a practical, commonsense decision whether, given all the circumstances in the affidavit before him . . . there is a *fair probability* that contraband or evidence of a crime will be found in a particular place.” *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990) (emphasis added). While this standard does not demand a showing that such a belief is ultimately correct or even more likely true than not, *see Simmons*, 47 F.3d at 1379, mere “conclusory allegations” will be insufficient to establish the probable cause necessary for the issuance of a warrant. *Wilhelm*, 80 F.3d at 119.

Within the context of an affidavit based upon informant hearsay, such an informant’s tip is rarely adequate, on its own, to support a finding of probable cause. *United States v. Miller*, 925 F.2d 695, 698 (4th Cir. 1991) (Powell, J., sitting by designation). It is instead necessary to look at the “totality of the circumstances” in assessing whether a search warrant, issued by a magistrate pursuant to such evidence, comports with the requirements of the Fourth Amendment. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983).

In examining the totality of the circumstances in which a CI is involved, there are a number of factors to take into consideration: (1) the informant's veracity and reliability; (2) the basis for the informant's knowledge, *Miller*, 925 F.2d at 698; and (3) the degree to which the information has been or can be corroborated. *United States v. Lator*, 996 F.2d 1578, 1581 (4th Cir. 1993). In applying these factors, I am mindful that this standard "is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules," *Blackwood*, 913 F.2d at 142, and that a deficiency in one factor may be compensated for, in determining the overall reliability of a tip, by a strong showing as to another, or by some other indicia of reliability. *See Gates*, 462 U.S. at 233.

Thus, under a deferential standard of review, I must determine whether the facts contained in the challenged affidavit were sufficient to establish probable cause. I believe that they were.

First, that the CI's reliability and veracity were well established cannot reasonably be called into question. Agent Lilly represented, and the magistrate had no reason to doubt, that this CI had a track record of producing truthful, relevant, and useful information in the prosecution of others. While ideally the magistrate would have been made aware of the extent of the CI's cooperation, especially with respect to this very defendant, the fact that he was not does not leave the affidavit fatally flawed. *See Gates*, 462 U.S. at 230 n.6.

Second, the basis for the CI's knowledge was likewise well established. It was certainly reasonable for the magistrate to believe that, based upon the amount of time he had known the defendant, the CI shared with him some sort of friendship. He had first-hand knowledge of the activities within the defendant's home and was apparently close enough with him that the defendant felt no hesitation in displaying and possessing firearms around the CI.

Finally, while the degree to which an officer can corroborate a CI's tip is an "important factor" in determining whether such a tip is sufficient to establish probable case, *Miller*, 925 F.2d at 698, it is no more important than any other single factor already espoused. *See Gates*, 462 U.S. at 230. Thus, its absence does not condemn this affidavit under Fourth Amendment scrutiny. *See United States v. Chalmers*, No.89-5925, 1990 WL 66817, at \*1-2 (6th Cir. May 21, 1990) (unpublished opinion).

Moreover, I believe that there were other indicia of reliability upon which the magistrate might have called in this case. The affidavit stated that the CI was a confidential informant, thus suggesting that he was seeking favorable treatment from the government in the form of either remuneration or consideration on a pending criminal charge. "[T]his circuit has stated that when an informant is giving testimony in hopes of being treated favorably, there is an indicia of reliability because the individual has nothing to gain from lying." *United States v. Patterson*, 150 F.3d 382,

386 (4th Cir. 1998). Hence, the magistrate had information from which he could surmise that the informant's interest in obtaining leniency or compensation created a strong motive to supply accurate information, *see Miller*, 925 F.2d at 699, because the presentation of false information would have had a deleterious affect on the CI's ultimate objective, whether that was financial or penal. Such false information could also have led to criminal charges. *See id.*

In examining the totality of the circumstances surrounding, I thus find that the issuance of this search warrant was supported by probable cause and will deny the defendant's motion on that ground.

### III

Alternatively, I find that even if probable cause was lacking, Agent Lilly had a good faith belief that the search warrant was based on probable cause and had an objectively reasonable basis to rely on the warrant. *See United States v. Edwards*, 798 F.2d 686, 690 (4th Cir. 1986) (citing *United States v. Leon*, 469 U.S. 213 (1983)).

There is no claim that Agent Lilly presented any knowing or recklessly false information to the magistrate. The fact that the CI had a prior history of alcohol and drug abuse and prior criminal conduct known to the agent did not by itself lessen his reliability in connection with the transactions involved in this case. There is no

evidence that the magistrate abandoned his neutral and detached judicial role and the affidavit here is not so lacking in indicia of probable cause as to render official belief in its existence unreasonable. *See United States v. Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996) (holding that reliance was unreasonable because the affiant merely asserted that the informant “projected a truthfull [sic] demeanor” to support her credibility).

#### IV

For the aforementioned reasons, it is **ORDERED** that the defendant’s Motion to Suppress (Doc. No. 12) is denied.

ENTER: August 24, 2001

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United States District Judge