

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

UNITED STATES OF AMERICA,)	CRIM. ACTION NO. 3:96CR50034
)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
RAY WALLACE METTETAL, Jr.,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

I.

Before the court are five motions *in limine* addressing issues related to the defendant's forthcoming trial, scheduled to begin on October 22, 2001. The defendant, Ray Wallace Mettetal, Jr., was tried and convicted in this court in 1998 on two counts of possessing a deadly toxin and false identification documents.¹ The defendant was sentenced to serve ten years in prison. The defendant's convictions in this court were vacated by the Fourth Circuit upon its finding that the police lacked probable cause to arrest the defendant following the lack of probable cause found by the state court in Tennessee, and thus evidence used to convict the defendant should have been excluded through application of the exclusionary rule. *United States v. Mettetal*, 213 F.3d 634 (4th Cir. 2000) [hereinafter "*Mettetal I*"]. Upon remand to this court from the Fourth Circuit, the defendant moved to dismiss the 1995 two-count indictment. The defendant's Motion to Dismiss was denied by the order and accompanying memorandum opinion of this court on June 16, 2000, based on application of the good faith exception to the exclusionary rule with respect to the

¹Attempted murder charges levied against the defendant in Tennessee were dropped in 1999 when a Tennessee state court found no probable cause for the defendant's arrest.

Virginia search warrants. *United States v. Mettetal*, 2000 WL 33232324 (W.D. Va. 2000) [hereinafter “*Mettetal II*”].

Having reviewed the motions *in limine*² and oppositions thereto, having heard oral argument by counsel, and for the reasons hereinafter set forth, the defendant’s motions shall be DENIED and DISMISSED as withdrawn, and the government’s motion shall be DENIED IN PART to the extent it seeks discovery in excess of that required under Rule 16(b)(1) of the Federal Rules of Criminal Procedure. Familiarity with the factual background of this case, described in *Mettetal I* and *Mettetal II*, shall be assumed. Additional relevant facts shall be discussed as they pertain to each of the parties’ respective motions.

II.

A. UNITED STATES’ RULE 16 MOTION FOR DISCLOSURE OF DOCUMENTS AND TANGIBLE OBJECTS, REPORTS OF EXAMINATIONS AND TESTS, AND EXPERT WITNESSES

The government requests that the defendant permit it to discover information pursuant to Federal Rule of Criminal Procedure, Rule 16(b)(1), subdivisions (A), (B) and (C). The prosecution has a reciprocal right to the discovery of the kinds of materials described in subdivisions (A) and (B) if the defendant has requested and received disclosure under subsections (C) or (D) of Rule 16(a)(1), the information sought is within the possession, custody, or control

² The defendant has filed a number of *pro se* motions in addition to those motions filed by his court-appointed attorneys. These *pro se* motions have been submitted often without the knowledge of the defendant’s attorneys, and have led to some confusion at oral argument. While a defendant has a right to be represented by counsel or proceed *pro se*, he does not have a right to a hybrid representation. *Faretta v. California*, 422 U.S. 806, 835 (1975). At oral argument on the motions *in limine* now before this court, the defendant formally waived his Sixth Amendment right to self-representation. Nevertheless, the court will briefly address the merit of those *pro se* motions that were scheduled for oral argument on September 12, 2001.

of the defendant, and that the things sought are things that “the defendant intends to introduce as evidence in chief at trial.” *See* 2 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §255 at 164. On July 25, 2001, the defendant filed a “Rule 16 Motion for the Production of Certain Objects.” Included within this motion was the defendant’s request that the court “order the government to produce all bench notes, test results, raw data, memoranda, calculations, and other documents related to all analyses of the substance that the government claims is the toxin ricin.” This court granted this motion in part by written order dated August 31, 2001. Furthermore, in the motion currently before the court, the government avers to the truth of the fact that “the defendant...has made various requests...pursuant to Rule 16(a)(1)(C), Rule 16(a)(1)(D), and Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure.” The government goes on to state that it “has met, and continues to meet its continuing obligation for the production of material covered by these requests.” Thus, the government is permitted discovery of the kinds of materials described in Rule 16(b)(1)(A) and (B) to the extent those materials are in the defendant’s possession, custody, or control, and provided that the defendant intends to introduce those materials as evidence in chief at trial.

In addition, Rule 16(b)(1)(C) provides that, if the defendant has requested disclosure under subdivision (a)(1)(E) of Rule 16 and the government has complied, the defendant shall, at the government’s request, provide to the prosecution a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial. This court finds that the prerequisites to discovery by the prosecution under subdivision (b)(1)(C) have been satisfied, and thus the defendant shall provide the prosecution with written summaries of testimony to the extent required by subdivision (b)(1)(C). While the

defendant must comply with his obligations under Rule 16(b)(1), and in fact indicated his willingness to do so at oral argument, the court does not suggest that the defendant was in any way failing to comply with his current obligations in the instant case. Therefore, the government's motion is denied except as pertaining to the discovery required pursuant to the defendant's obligations under Rule 16(b)(1).

B. DEFENDANT'S MOTION TO RECONSIDER DEFENDANT'S MOTION TO DISMISS

Following the decision of the Fourth Circuit to vacate his conviction, the defendant moved this court to dismiss the indictment for the reason that the evidence used to convict him was found to be the fruit of an unlawful arrest and therefore should be suppressed. In an order entered June 16, 2000, this court denied the motion to dismiss, based on the *Leon* good faith exception to the exclusionary rule. The defendant now moves this court to reconsider its June 16, 2000 order in light of *United States v. Meixner*, 128 F.Supp.2d 1070 (E.D. Mich. 2001). While not binding on this court, the defendant argues that *Meixner* incorporates a persuasive analysis of the relationship between the good faith exception and the "fruit of the poisonous tree" doctrine that may justify reconsideration of this court's June 16, 2000 Memorandum Opinion.

In *Meixner*, a Michigan State Police Officer, Tanner, responded to a 911 hang-up call from the defendant's home. Upon arrival, Officer Tanner entered the defendant's home even after the defendant told him not to come in, and despite the fact that Officer Tanner did not have a warrant. Officer Tanner claimed to have been concerned that the 911 hang-up was the result of a domestic dispute. While searching the home, Officer Tanner observed a number of firearms, and subsequently reported his observations to a Bureau of Alcohol, Tobacco and Firearms (BATF)

agent. The BATF agent used the information provided by Officer Tanner to obtain a search warrant of the defendant's home and seize the weapons. The defendant was then charged in a three-count Indictment with being a felon in possession of firearms and with possessing sawed-off shotguns. *Meixner*, 128 F.Supp.2d at 1072.

The defendant in *Meixner* moved the court to suppress the evidence (i.e., firearms) seized by the BATF agent during execution of the search warrant. The court granted the defendant's motion, finding that the exclusionary rule precluded the introduction of the firearms into evidence. Furthermore, the court determined that the good faith exception did not preclude suppression of the evidence. In making this determination, the court found that the BATF agents' good faith was not sufficient to dissipate the effect of the tainted search warrant application referencing information obtained from Officer Tanner's illegal entry into the defendant's home. *Meixner*, 128 F.Supp.2d at 1077.

The court in *Meixner* asserted that the *Leon* good faith exception was intended to apply only to search warrants that were defective due to magistrate error. The *Leon* decision did not address a situation in which the information in the affidavit had been procured in violation of the Fourth Amendment. That is, the *Leon* decision, "did not attempt to reconcile the newly-announced good faith exception with the 'fruit of the poisonous tree' doctrine state in *Wong Sun v. United States*, 371 U.S. 471 (1963)." *Meixner*, 128 F.Supp.2d at 1076. The court recognized that courts in many other circuits had applied the good faith exception in circumstances where information supporting a search warrant was obtained by police in police-citizen encounters later determined to violate the Fourth Amendment. *Id.* Nevertheless, the court in *Meixner* determined that the exclusionary rule should apply unless there are circumstances in which the prior Fourth

Amendment violation is so remote as to dissipate the taint.³ *Id.* at 1077.

This court disagrees with the proposition that the good faith exception applies only when a magistrate judge has made a technical error or an error in legal judgement. The court in *Meixner* correctly asserts that *Leon* addressed a situation in which a warrant was defective due to magistrate error. However, as the court in *Meixner* also makes clear, many courts, including the Supreme Court, have expanded the good faith exception to govern situations beyond the immediate facts of *Leon*. For example, in *Illinois v. Krull*, the Supreme Court held that the good faith exception applied to an officer's reasonable reliance on a statute that was later determined to be unconstitutional. 480 U.S. 340 (1987). Furthermore, and most relevant to the action currently before this court, the Second, Eighth, and District of Columbia Circuits have extended the good faith exception to cover illegal predicate searches. See Gretchan R. Diffendal, Note, *Application of the Good-Faith Exception in Instances of a Predicate Illegal Search: "Reasonable" Means Around the Exclusionary Rule?*, 68 St. John's L. Rev. 217, 227 (1994) (citing *United States v. Carmona*, 858 F.2d 66, 68 (2d Cir. 1988); *United States v. Kiser*, 948 F.2d 418, 422 (8th Cir. 1991), cert. denied, 112 S. Ct. 1666 (1992); and *United States v. Thornton*, 746 F.2d 39, 49 (D.C. Cir. 1984)).

Most of the courts recognizing an extension of the good faith exception to illegal predicate searches have based their decision on the balancing of the exclusionary rule's deterrent effect against the societal costs of suppression. This balance was the basis for the Supreme Court's recognition of the good faith exception in *Leon*, and should be applied on a case by case

³This would be an application of the attenuation exception to the exclusionary rule, not the good faith exception.

basis to the facts involved. Restricting the Court's holding in *Leon* to its unique facts ignores the doctrine of precedent upon which our judicial system is based. It is the principle set forth in a case like *Leon*, and not necessarily the existence of similar factual circumstances, that should be considered when evaluating whether that case should control the outcome of another. Thus, the good faith exception should generally apply when the detrimental effect of suppression outweighs its deterrent effect. This may include cases where the underlying defect resulted from law enforcement error rather than magistrate error.

This is not to say that officials can, without more, launder their prior unconstitutional behavior by passing it to a magistrate judge. However, when the detrimental effect of suppression outweighs its deterrent effect, the good faith exception may be applicable even where a Fourth Amendment violation has occurred. In this case, application of the balancing principle underlying *Leon* merits the introduction of the Virginia evidence procured by Officer Hoover despite the fact that the warrant issued in Virginia was based in part on information illegally obtained in Tennessee. As discussed in this court's June 16, 2000 Memorandum Opinion, neither Officer Hoover nor the magistrate judge issuing the warrant knew, or had reason to suspect, that the information received from the police in Tennessee had been illegally obtained. Thus, suppressing the evidence obtained by Officer Hoover in Virginia would have little or no deterrent effect on his future conduct or that of the magistrate judge who, based on the information provided, made an appropriate determination of probable cause. Furthermore, the illegally procured evidence was suppressed with regard to the attempted murder charges brought against the defendant in Tennessee. This action was arguably sufficient to deter the future conduct of those who engaged in the unlawful conduct and investigated the attempted murder charge- the Nashville police.

However, any deterrent effect on Officer Hoover or the magistrate judge in Virginia, whose actions were not only innocent but temporally and spacially removed from those of the Tennessee police⁴, would be outweighed by the negative effects of suppressing the Virginia evidence.

C. DEFENDANT’S *PRO SE* MOTION TO TRANSFER CASE FOR TRIAL PREJUDICE WITHIN DISTRICT

Rule 21(a) of the Federal Rules of Criminal Procedure states that

The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant’s motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding in that district.

The defendant argues that “numerous and inflammatory news media reports” have established so great a prejudice against him that he cannot possibly receive a fair trial anywhere within the Virginia Western District. However, as the government points out, Rule 21(a) has been held by the Fourth Circuit to require not only that prejudicial publicity has been widespread but also that it would be impossible to select an unbiased jury. The ability to select an unbiased jury is not presumed to be met simply because pretrial publicity has been inflammatory and widespread. *United States v. Jones*, 542 F.2d 186, 193 (4th Cir. 1976).

The government contends that satisfaction of the second criteria, selection of an unbiased jury, requires *voir dire* of the prospective jurors to determine whether they have actually been prejudiced. Both *Wansley v. Slayton*, 487 F.2d 90, 92-93 (4th Cir. 1973),

⁴ Note that this temporal and spacial separation did not exist in *Meixner*. This factual difference alone may distinguish *Meixner* from the current case.

and *United States v. Bakker*, 925 F.2d 728, 732 (4th Cir. 1991), state that *voir dire* is the generally accepted method of determining whether or not an impartial jury can be selected.

Wansley requires that pretrial publicity be “recent, widespread, and highly damaging to the defendants.” *Wansley*, 487 F.2d at 92-93. The government correctly states that the defendant has not established the existence of these criteria. Only one of Mettetal’s four examples of pretrial publicity is dated; he also fails to demonstrate that these articles have prejudiced any prospective jurors.

Even if it can be reasonably inferred that some potential jurors have read the articles exhibited by the defendant and that the articles have the potential to be prejudicial, prior to *voir dire*, it cannot be concluded that it would be impossible for an unbiased jury to be selected. Therefore, the request for a change of venue should be denied.

D. DEFENDANT’S *PRO SE* MOTION TO SUPPRESS EVIDENCE

The defendant argues that evidence obtained using the search warrant issued in Virginia should be suppressed under *Franks v. Delaware*, 438 U.S. 154 (1978), because the affidavit submitted in support of the search warrant contained “reckless and/or intentional misstatements of material fact.” The defendant then identifies what he alleges to be a number of “lies” in the affidavit.

The affidavit in support of the search warrant is presumptively valid, and therefore the burden of proof on a defendant seeking a hearing pursuant to *Franks* is high. *See U.S. v. Jeffus*, 22 F.3d 554, 558 (4th Cir. 1994). Before a hearing will be granted, the defendant “must make 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.” *Franks*, 438 U.S. at 155-56. Furthermore, a hearing will not be granted unless the allegedly false or omitted information is essential to the finding of probable cause. *Id.* There must be allegations of deliberate falsehood or material omissions, accompanied by an offer of proof, to merit a *Franks* hearing- mere conclusory statements will not suffice. *See U.S. v. Akinkoye*, 185 F.3d 192, 198 (4th Cir. 1999).

In this case, the defendant has made merely conclusory statements regarding the truth of matters asserted in the affidavit, and has also neglected to show that, if misstatements were made in the affidavit, they were made knowingly and intentionally, or with reckless disregard for the truth. Therefore, absent this substantial preliminary showing, the defendant’s motion under *Frank* should be denied.

E. DEFENDANT’S *PRO SE* MOTION TO EXCLUDE EVIDENCE PURSUANT TO FEDERAL RULES OF EVIDENCE 901 AND 403

The defendant filed a *pro se* motion on September 10, 2001, seeking to exclude from evidence “any analysis, inference, or reference to laboratory reports dated 20 June 1996 and 21 May 1997.” As discussed in open court, the issues raised by the defendant in this motion are more appropriately raised at trial, and for this reason, counsel for the defendant withdrew this motion. Thus, this motion will be dismissed.

III.

To summarize, (1) the United State’s “Rule 16 Motion for Disclosure of Documents and Tangible Objects, Reports of Examinations and Tests, and Expert

Witnesses” shall be, and it hereby is, DENIED IN PART to the extent it seeks discovery in excess of that required under Rule 16(b)(1) of the Federal Rules of Criminal Procedure; (2) the defendant’s “Motion to Reconsider Defendant’s Motion to Dismiss” shall be, and it hereby is, DENIED; (3) the defendant’s *pro se* “Motion to Transfer Case for Trial Prejudice within District” shall be, and it hereby is, DENIED; (4) the defendant’s *pro se* “Motion to Suppress Evidence” shall be, and it hereby is, DENIED; and (5) the defendant’s *pro se* “Motion to Exclude Evidence Pursuant to Federal Rules of Evidence 901 and 403” shall be, and it hereby is, DISMISSED as withdrawn.

Each of the foregoing rulings is made in consonance with and subject to the reasoning, the inclusions and exclusions as set out in the text of this opinion.

An appropriate Order shall this day issue.

ENTERED: _____

Senior United States District Judge

Date

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

UNITED STATES OF AMERICA,) CRIM. ACTION NO. 3:96CR50034
)
)
 v.) ORDER

is, DENIED;

5. Defendant's *pro se* "Motion to Exclude Evidence Pursuant to Federal Rules of Evidence 901 and 403" shall be, and it hereby is, DISMISSED as withdrawn;

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED: _____

Senior United States District Judge

Date