

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

UNITED STATES OF AMERICA,)

v.)

**TERRY McCLANAHAN,
Defendant)**

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Criminal No. 1:03CR00118

REPORT AND

RECOMMENDATION

By: PAMELA MEADE SARGENT

United States Magistrate Judge

I. Background

This case is before the court on the defendant's motion to suppress, (Docket Item No. 10), ("the Motion"). The Motion asserts that certain evidence seized as a result of the execution of a state search warrant and certain statements made by the defendant should be suppressed. This matter is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The undersigned conducted a hearing on the Motion on March 8, 2004. At the hearing, the court granted leave for the parties to file additional written arguments. Those written arguments have now been received and reviewed by the undersigned and the matter is ripe for decision. As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

II. Facts

McClanahan has been charged in a one-count indictment with being in

possession of a firearm after having been convicted of a crime punishable by a term of imprisonment exceeding one year in violation of 18 U.S.C. § 922(g)(1). The facts relevant to the Motion are undisputed. On August 26, 2003, Investigator Joe Fuller, (“Fuller”), of the Buchanan County Sheriff’s Office swore an affidavit in support of a request for a search warrant for McClanahan’s residence and his person before Buchanan County Circuit Judge Keary Williams. A copy of this affidavit, the search warrant at issue and the return on the warrant were admitted at the hearing as Government’s Exhibit No. 1. On the affidavit, Fuller requested to search McClanahan’s residence for marijuana, marijuana plants, seeds or any other illegal paraphernalia, weapons, monies, growing equipment, safes or other secure containers and records, recordings or other information pertinent to the possession, distribution or manufacture of marijuana or any other illegal drugs. The affidavit also states:

The material facts constituting probable cause that the search should be made are:

Information from a reliable informant stating that in the past 72 hours a large quantity of illegal drugs and weapons were seen at the described residence.

The affidavit further states:

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 information to this affiant in the past that has led to the purchase and seizure of illegal narcotics on several [occasions] in this area.

While the affidavit is signed by Judge Williams, his signature simply affirms that the

affidavit was subscribed and sworn to before him at 4:17 p.m., August 26, 2003. Nowhere on the face of the affidavit does it state that Judge Williams made a finding of probable cause for the issuance of the warrant.

Twelve minutes later, the Buchanan County Circuit Court Clerk James M. Bevins Jr., (“Bevins”), issued a search warrant for McClanahan’s residence and his person. The warrant states:

This Search Warrant is issued in relation to an offense substantially described as follows:

1. The possession and/or distribution of illegal drugs and drug paraphernalia in violation of Va. State Code 18.2-248.
2. Possession or Manufacture of Marijuana with the intent to distribute in violation of Va. State Code 18.2-248.1.
3. The Possession of a firearm after being convicted of a felony in violation of Va. State Code 18.2-308.

I, the undersigned, have found probable cause and believe that the property or person constitutes evidence of the crime identified herein or tends to show that the person(s) named or described herein has committed or is committing a crime and further that the search should be made, based on the statements in the attached affidavit....

The warrant is signed by Bevins. Fuller testified that he offered no information, other than that contained in the affidavit, to Bevins in support of his request for a warrant.

Officers executed this warrant later that evening and found one 12-gauge shotgun, marijuana leaves, a can with two containers of seeds, a pipe with residue, six marijuana plants and three shotgun shells. Fuller did not participate in the search of McClanahan’s home, but he encountered McClanahan walking on a road near the

residence, informed McClanahan of the ongoing search of his residence, advised him of his Miranda rights and then gave McClanahan a ride to his residence. McClanahan arrived at the residence just as the officers completed their search.

Once he arrived at the residence, McClanahan sat on the porch with Virginia State Police Special Agent Philip Hagwood, (“Hagwood”). Hagwood testified that Fuller told him that he had informed McClanahan of his Miranda rights. Hagwood stated that he did not question McClanahan. Hagwood stated that McClanahan voluntarily stated that he possessed the shotgun to protect his children and his chickens from bears. McClanahan also stated that the shotgun was so old it might blow up if fired.

At the hearing, it was revealed that the informant who provided the information contained on the affidavit used to obtain the search warrant was the defendant’s ex-wife, Patricia J. Lester.

III. Analysis

Through the Motion and his brief in support of the Motion, McClanahan asserts that the evidence seized in the search of his residence should be suppressed because the affidavit did not state probable cause to support the issuance of the warrant. McClanahan further asserts that the evidence should be suppressed because the informant who offered the evidence against McClanahan was biased against him and this information should have been provided and considered in determining whether there was probable cause to support the issuance of the search warrant. In his brief,

McClanahan also asserted that his statements to Hagwood should be suppressed because they were made while he was being detained without his first being advised of his Miranda rights. Based on the testimony presented at the hearing, McClanahan's counsel conceded that the evidence showed that McClanahan had been advised of his Miranda rights prior to making these statements, and, therefore, he withdrew his motion to suppress McClanahan's statements.

At the hearing, the undersigned expressed concern regarding the validity of this search warrant based on its issuance by a clerk of court rather than a judge or magistrate. Nevertheless, it appears that Virginia state law allows a clerk of court to issue a search warrant upon a finding of probable cause, *see* VA. CODE ANN. §§ 19.2-56, 19.2-71 (Michie 2000 & Supp. 2003), and the United States Supreme Court has stated that a warrant issued by a clerk of court meets the constitutional requirements that the warrant be issued by a neutral and detached person. *See Shadwick v. City of Tampa*, 407 U.S. 345 (1972); *see also United States v. Blackwood*, 913 F.2d 139 (4th Cir. 1990) (validity of search warrant issued by clerk of court upheld without discussing the issue). Therefore, I hold that the issuance of this search warrant by the county circuit court clerk does not affect its validity.

I next turn my attention to McClanahan's argument that the evidence seized should be suppressed because the affidavit offered in support of the warrant did not establish probable cause. "Search warrants must be supported by probable cause to satisfy the dictates of the Fourth Amendment." *United States v. Wilhelm*, 80 F.3d 116, 118 (4th Cir. 1996) (quoting *United States v. Harris*, 403 U.S. 573, 577 (1971)). The Supreme Court has described the "probable cause" required to authorize a search as

“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). Also, probable cause may be established through hearsay information from a reliable informant. See *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965); *Draper v. United States*, 358 U.S. 307, 312-13 (1959). Furthermore, on review, a finding of probable cause is to be given “great deference.” *Blackwood*, 913 F.2d at 142 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

In *Gates* the Supreme Court adopted a “totality-of-the-circumstances” test to determine whether probable cause supported the issuance of a search warrant. 462 U.S. at 238. The Court also noted that, under this analysis, two factors were instrumental in determining whether hearsay information provided by an informant amounted to probable cause for a search. Those two factors are the informant’s “veracity” or “reliability” and his or her “basis of knowledge.” 462 U.S. at 238. The Court in *Gates* also recognized, however, that “conclusory” statements from reliable informants were not sufficient to establish probable cause. 462 U.S. at 239. “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.” 462 U.S. at 239. The Court in *Gates* affirmed its holding in *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), that an affidavit must contain some of the underlying facts and circumstances from which the informant concluded that contraband was present in the identified location to be sufficient to establish probable cause. 462 U.S. at 239.

In this case, the affidavit on its face stated that this informant had proven reliable in the past in that she had provided information that had led to the purchase and seizure

of illegal drugs on several previous occasions. The affidavit does not, however, give any information regarding the informant's "basis of knowledge." Instead, the affidavit states only: "Information from a reliable informant stating that in the past 72 hours a large quantity of illegal drugs and weapons were seen at the described residence." The affidavit contains no information as to whether the informant personally observed the drugs and weapons at the residence or whether she had received this information from another person. The affidavit contains no information as to what drugs were observed at the residence other than the conclusory statement that the drugs were "illegal." The affidavit also contains no information as to what type of weapons were observed at the residence. Furthermore, the affidavit contains no allegation that any of the information provided by the informant was corroborated by authorities prior to seeking the search warrant.

Thus, the affidavit presented to Bevins contained nothing more than the "bare bones" conclusion of the informant that "illegal drugs and weapons" were present at McClanahan's residence within the past 72 hours. Therefore, I find that Bevins's actions in issuing this warrant amounted to nothing more than "a mere ratification of the bare conclusions of others." *See Gates*, 462 U.S. at 239. I believe this finding is further supported by the fact that the warrant recites that it is being issued in relation to at least three offenses of which absolutely no evidence was offered in the affidavit: the distribution of illegal drugs, the manufacture of marijuana and the possession of a firearm by a convicted felon. I also note that the warrant allowed a search of McClanahan's person, when the affidavit contained no information of his involvement in the offenses alleged other than a conclusory statement that illegal drugs had been seen at his residence. Based on the above stated reasons, I find that the affidavit

presented to Bevins did not state facts sufficient to amount to probable cause to support the issuance of the search warrant for McClanahan's residence. Based on this finding, I do not address McClanahan's remaining argument that the bias of the informant should have been revealed.

The Government argues that, regardless of whether probable cause supported the issuance of this search warrant, the evidence gathered as a result of the search should not be suppressed under the "good faith" exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 915, 918-20 (1984) (exclusionary rule does not bar admission of evidence gained by officers acting in objectively reasonable reliance on a warrant later determined to be invalid). The Supreme Court in *Leon* outlined four situations in which an officer's reliance on a such warrant would not be reasonable, including when the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *See Leon*, 468 U.S. 922-23. I find that such is the case here. In particular, I find that the "bare bones" affidavit offered in support of the warrant in this case was so lacking in indicia of probable cause as to render reliance on the warrant objectively unreasonable. *See Wilhelm*, 80 F.3d at 121-23; *see also United States v. Barrington*, 806 F.2d 529, 532 (5th Cir. 1986). I also note that, under *Leon*, the fact that the search warrant was executed by a law enforcement officer who may have been unfamiliar with the contents of the affidavit, is inconsequential. *See Leon*, 468 U.S. at 923 n.24 ("Nothing is our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.")

In reaching this holding I am mindful of the Supreme Court's admonition that a reviewing court should give "great deference" to a finding of probable cause. *See Spinelli*, 393 U.S. at 419. Nonetheless, the Fourth Amendment's guarantee against unreasonable governmental intrusions into the sanctity of an individual's home is one of our nation's most important civil liberties. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *Silverman v. United States*, 365 U.S. 505, 511 (1961). To allow the use of evidence gathered pursuant to a search warrant issued on the scant information provided in this case would, in essence, nullify this right.

Therefore, based on the above-stated reasons, I will recommend that the court grant the Motion and suppress the evidence gathered as a result of the search of McClanahan's residence.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The affidavit at issue in this case did not state facts sufficient to demonstrate probable cause to support the issuance of the search warrant for McClanahan's residence;
2. The issuance of the warrant for the search of McClanahan's residence violated the Fourth Amendment of the United States Constitution in that

it was unreasonable because it was not issued upon a proper finding of probable cause; and

3. The good-faith exception to the exclusionary rule does not prevent the suppression of the evidence seized in the search of McClanahan's home because the officer's reliance on the warrant was not reasonable.

RECOMMENDED DISPOSITION

Based upon the above-stated reasons, the undersigned recommends that the court grant the Motion.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence or

recommit the matter to the magistrate [judge] with instructions.

Failure to file timely written objections to these proposed findings and recommendations within ten days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record at this time.

DATED: This 14th day of April, 2004.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE