

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-721-2020
:
vs. :
:
: OPINION AND ORDER RE
NICHOLAS ETUMNU, : DEFENDANT’S SUPPLEMENTAL
: OMNIBUS PRETRIAL MOTION
Defendant

OPINION AND ORDER

By Supplemental Omnibus Pretrial Motion filed on November 19, 2020, Defendant asserts that the Affidavit of Probable Cause lacks probable cause to search the residence located at 924 Race Street, Williamsport, PA 17701. Defendant further argues that there was insufficient information set forth in the Affidavit of Probable Cause to establish the credibility of the confidential source. Finally, Defendant argues that the Affidavit of Probable Cause does not include information relevant to any corrupting motive of the informant or whether he/she is providing information in exchange for leniency in a pending criminal case.

The search warrant application and affidavit were presented to the issuing authority on June 8, 2020. The author, Detective Kevin Dent of the Lycoming County District Attorney’s Narcotic Enforcement Unit (NEU) submitted the relevant documents to President Judge Nancy Butts who reviewed them and signed the authorization on June 8, 2020.

Since 2017, Detective Dent was involved in hundreds of investigations involving the sale and delivery of controlled substances through his work with the NEU and as a Reserve Criminal Investigator for the Naval Criminal Investigation Service. He has extensive training and experience with narcotics interdiction, wiretaps and surveillance.

Approximately four weeks prior to the June 8, 2020 date, a “confidential informant” provided Detective Tyson Havens with information regarding the defendant who was described by name and as a black male. According to the confidential informant, the defendant provided the confidential informant with crack cocaine and was dealing crack cocaine in and around Williamsport. This particular confidential informant was proven to be reliable in the past through six to ten prior successful drug purchases with at least one resulting in the seizure of an illegal firearm.

On the date of the application, Detective Edkin provided Detective Dent with information from a “confidential source” that the defendant deals crack out of several locations including 924 Race Street, Williamsport, PA 17701 utilizing a phone number of 570-666-8543.

This information from the confidential source was subsequently corroborated when Detective Dent conducted an undercover buy of cocaine at the Sheetz in Linden, PA by utilizing the telephone number provided by the confidential source. The seller of the cocaine was a Mr. Raymond. Immediately, following the transaction, Detective Havens conducted a vehicle stop of Mr. Raymond who provided an address of 657 Campbell Street. Mr. Raymond was released from the traffic stop and while under surveillance was followed back to 924 Race Street and not 657 Campbell Street.

The detectives then established surveillance at 924 Race Street. Following the transaction referenced above, law enforcement observed Raymond depart the residence, while on his phone, get into an unknown vehicle for less than thirty seconds, exit and then return to 924 Race Street. This behavior was indicative of drug trafficking. Based on Dent’s

training and experience in drug transactions, drug traffickers use several locations to store and sell their drugs and use runners to sell their drugs.

The totality of the circumstances including all reasonable inferences therefrom, indicate that a reliable confidential informant within the past four weeks purchased crack cocaine from the defendant in and around Williamsport. Additional information from a confidential source revealed that the defendant deals crack out of several locations including 924 Race Street and while utilizing a specific telephone number. This was corroborated when the specific phone number was utilized to conduct a transaction involving crack cocaine the same day of the search warrant application. Further corroboration of the confidential sources' reliability was through surveillance at the Race Street address where the alleged runner was seen returning to following the transaction and again engaging in another suspected transaction utilizing the address.

Once a motion to suppress has been filed, it is the Commonwealth's burden to prove by a preponderance of the evidence that the challenged evidence was not obtained in violation of the defendant's rights. *Commonwealth v. Wallace*, 42 A.3d 1040, 1047-1048 (Pa. 2002); see also Pa. R.Crim.P. 581 (H).

In order for a search warrant to be valid, the affidavit of probable cause must establish probable cause to believe that contraband or evidence of a crime will be found in a particular place. *Commonwealth v. Clark*, 28 A.3d 1284, 1290 (Pa. 2011). The task is to make a practical, common sense determination, whether given all of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*

The inquiry is limited to the four corners of the affidavit. *Commonwealth v. Arthur*, 62 A.3d 424, 432 (Pa. Super. 2013). The question of whether probable cause exists for the issuance of a search warrant must be answered according to the totality of the circumstances. *Id.* Probable cause is based on a finding of the probability, not a prima facie showing of criminal activity. *Id.*

The issuing authority may rely on hearsay statements to establish probable cause as long as the hearsay is reliable. *See Commonwealth v. Torres*, 764 A.2d 532, 537-538 (Pa. 2001); *Commonwealth v. Gray*, 503 A.2d 921, 925 (Pa. 1985) (“The 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.”). Further, the Commonwealth may rely on information from anonymous or confidential sources that is corroborated by independent police investigations. *Torres, id.*

The uncorroborated hearsay of an unidentified informant may be accepted as a credible basis for issuing a search warrant if the affidavit of probable cause avers circumstances that support the conclusion that the informant was credible. *Id.*; *Commonwealth v. Huntington*, 924 A.2d 1252, 1255 (Pa. Super. 2007).

Defendant’s first claim fails. The averments set forth in the affidavit of probable cause read in a practical, common sense manner, indicate that there is a fair probability that contraband or evidence of a crime would be found in the residence located at 924 Race Street. Not only was there information from a confidential informant who was

reliable but there was also information from a confidential source that was corroborated by an actual transaction that occurred on the date the affidavit was authored using the exact telephone number provided by the confidential source, but also by surveillance which confirmed that the dealer was using the residence at 924 Race Street as a location from which he would conduct illegal drug transactions.

To the extent the defendant argues that the affidavit fails to provide the issuing authority with sufficient information to determine the credibility of the confidential source, this argument fails as well. The credibility of the confidential source was corroborated by a transaction using the telephone number that the confidential source provided, an actual illegal drug transaction and subsequent surveillance. The fact that the affidavit of probable cause does not provide further information on the confidential source is not fatal.

Finally, Defendant claims that the affidavit of probable cause does not include information relative to any corrupting motive of the informant, or whether he/she is providing information in exchange for leniency in a pending criminal case. (Motion, paragraph 10). In support of this contention, Defendant cites *Commonwealth v. Baker*, 615 A.2d 23 (Pa. 1992).

The decision in *Baker* actually confirms that hearsay information is sufficient to form the basis of a warrant so long as the [issuing authority] has been provided with sufficient information to make a neutral and detached decision about whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Baker*, *Id.* at 25. The Supreme Court rejected *Baker's* contention that the affidavit failed to establish

probable cause. The evidence demonstrated that hearsay information provided by the informant was corroborated by law enforcement's investigation and surveillance. "[T]he agent corroborated the informant's admission with first-hand knowledge, that he gave the informant money to buy narcotics in a controlled situation, and that the informant returned with cocaine." *Id.* at 26.

Baker argued in the alternative that the issuing authority should have been told that the informant had been recently convicted for robbery, that the Commonwealth had promised to nolle pros a charge of escape to which the informant had pled guilty in exchange for his cooperation, and that the informant had a drug abuse problem. Evidence of a corrupting influence by the police is a relevant consideration, which should be made available to a magistrate so that he/she might make a neutral and detached decision about whether all of the information shows probable cause. *Baker, id.*, citing *Commonwealth v. Moss*, 543 A.2d 514 (Pa. 1988). Where it can be established that evidence was withheld showing that an informant had a reason to falsify his information, it would follow that the issuing authority's determination of probable cause was neither neutral nor detached. *Baker, id.*

The Supreme Court in *Baker* ultimately denied *Baker's* assertions noting, among other things, that the evidence did not establish corruption, that the informant's admission against his penal interest drew the same inference concerning the informant's truthfulness, and that the corrupting influence would only explain the motivation of the informant in cooperating with the police. "In short, we conclude that the evidence offered at the suppression hearing was insufficient to establish a corrupting influence on the part of the

police or that such information was improperly withheld from the magistrate.” *Baker, id.* at 27.

A defendant has a right to challenge omissions in the affidavit of probable cause. *Commonwealth v. James*, 69 A.3d 180, 189 (Pa. 2013); *Commonwealth v. Taylor*, 850 A.2d 684 (Pa. Super. 2004). Challenges of this nature must be resolved with evidence beyond the affidavit’s four corners. *James, id.* at 190. The task of the court is to determine whether the omitted facts need to be included in determining probable cause. *Id.*

Where omissions are the basis for a challenge to an affidavit of probable cause, the following test is applied:

(1) whether the officer withheld a highly relevant fact within his knowledge, where ‘any reasonable person would have known that this is the kind of thing that a judge would wish to know’; and (2) whether the affidavit would have provided probable cause if it would have contained a disclosure of the omitted information.

Taylor, 850 A.2d at 689 (Pa. Super. 2004) (citations omitted).

The only method to effectively probe the omission of relevant facts is to allow a defendant meaningful cross-examination of the police officer affiant at the suppression hearing. *Commonwealth v. Hall*, 302 A.2d 342, 345-346 (Pa. 1973). “The burden is on the Commonwealth to establish the validity of the search warrant and the burden is not carried by merely introducing the search warrant and affidavit with no supporting testimony because the only way for the defendant to challenge the veracity of the information is to call witnesses himself and this effectively shifts onto him the burden of disproving the veracity of the information, an almost impossible burden.” *Commonwealth v. (Patrick) Ryan*, 442 A.2d 739, 743 (Pa. Super. 1982) (quoting *Commonwealth v. (William) Ryan*, 407 A.2d 1345, 1348

(Pa. Super. 1979)).

However, and on the other hand, a defendant's attack on the affidavit must be more than conclusory and must be supported by more than the mere desire to cross-examine. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). In essence, the defendant must allege the omissions accompanied by an offer of proof. *James*, 69 A.3d at 188 (citing *Franks, Id.*).

The defendant has failed to make any offer of proof other than arguing that he is entitled to test the veracity, reliability and basis of the source's knowledge. His conclusion is without merit. The defendant may not engage in a fishing expedition for the purpose of cross-examining the officer. The defendant's motion argues that the affidavit used to support the search warrant contained material omissions of relevant information regarding the veracity and reliability of the informant. In order to obtain a hearing in this matter, the defendant must provide more; he has not.

ORDER

AND NOW, this 10th day of February 2021 following a hearing and argument, Defendant's Motion to Suppress is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Robert Hoffa, Esquire
Work file
Gary Weber, Esquire