UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**3:92-CR-360-X**
	)	
XXXX XXXX XXXX,	)	
	)	
Defendant.	)	
	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

This Court held a hearing on Defendant XXXX XXXX's Motion to Suppress Evidence on November 23, 1992. Following the hearing, the Court took Mr. XXXX's Motion under advisement and invited the parties to submit supplemental briefs.

A. FALSE AFFIDAVIT

At the suppression hearing, it became clear during the testimony of Officer Armando Perez that Perez submitted a false and misleading affidavit to a Dallas County Magistrate in order to obtain a search warrant for Mr. XXXX's home. Perez's affidavit, which is duly sworn to upon his oath, states that:

> "On this date, June 16, 1992, I, the Affiant [Armando Perez], received information from a confidential informant...in the City of Dallas, Dallas County, Texas, within the past twenty-four (24) hours. I, the Affiant, have received information from the informant regarding narcotics and other criminal cases and have found the information to be true and reliable."

At the suppression hearing, however, Perez testified that, in fact, he had not received his information from a confidential informant as he swore to in his affidavit, but rather he had received his information from Agent Tom Crowley. T 9:9-15; T 11:1-3.[1] Perez conceded that Agent Crowley was not the confidential informant he referred to in his affidavit (T 11:11-19, T 17:25-18:2) and, indeed, testified that he was not even sure who the confidential informant was! T 15:16-18. Furthermore, testimony was given by an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF) that the ATF task force, to which Officer Perez is assigned, prefers to get state search warrants, even in federal cases, because a county magistrate gives less scrutiny to the facts contained in the affidavit than does a federal magistrate. T 51:14-25.

Several courts have confronted the identical situation that this Court now confronts. For example, the United States Court of Appeals for the Ninth Circuit, in United States v. Davis, 714 F.2d 896 (9th Cir. 1983), was presented with evidence that a police officer (Officer Thompson) had secured a search warrant based upon an affidavit indicating that he had personal knowledge of the facts contained in the affidavit when, in fact, he had taken most of the facts in his affidavit verbatim from an affidavit prepared by another police officer (Officer Epstein) who had previously obtained a separate and distinct search warrant. Id. at 897. The Ninth Circuit found that Officer Thompson chose to mislead the magistrate issuing the search warrant because of the fact that Officer Epstein was not available to sign his own affidavit and Officer Thompson did not want to wait until he became available. Id. In other words, Thompson, like the agents in the instant case, mislead the magistrate for the sake of expediency. " 'Unfortunately, the [Thompson] affidavit was not changed to state" Officer Epstein was told," but remained in the first person singular. Thus, Thompson did not, as he swore in the affidavit, communicate directly with any of the listed informants.'" Id. at 897-98 (citation omitted)

The Ninth Circuit, relying on the United States Supreme Court decision in Franks v. Delaware, 438 U.S. 154 (1978), held that the evidence obtained from Officer Thompson's search

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[1] Reference are to the Transcript (T) with page number: line number(s).

warrant must be suppressed. Davis, 714 F.2d at 898.[2] First, it found that the statements of personal knowledge sworn to by Officer Thompson were false and that "Thompson knew them to be false, when he signed the affidavit." Id. at 899. Second, the Ninth Circuit held that if the challenged material was excised from Thompson's affidavit, the search warrant would fail. Id. at 892.

> By failing properly to identify his sources of information Officer Thompson made it impossible for the magistrate to evaluate the existence of probable cause. Franks teaches that when, as in this case, that failure is intentional the warrant must be invalidated. The fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error.

Id. at 899.

The Alabama Court of Criminal Appeals and two Florida appellate courts also invalidated search warrants and suppressed evidence on facts almost identical to the facts of the instant case. In Villemez v. State, 555 So2nd 342 (Ala. Crim. App. 1989) the Alabama Criminal Court of Appeals considered a search warrant affidavit alleging personal knowledge of facts attested to by

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[2] In Franks, the Supreme Court held that a defendant is entitled to an evidentiary hearing to challenge the validity of a search warrant if the defendant can establish (i) an affiant in an affidavit supporting a search warrant made a false statement intentionally, knowingly, or with reckless disregard for the truth, and (ii) the affidavit is insufficient to support a finding of probable cause after the misstatements are set aside. Franks, 483 U.S. at 171-72. Interestingly enough, Franks involved an affidavit by a Delaware police officer claiming personal knowledge of informants' statements. The defendant, however, had alleged that the informants did not speak to the affiant directly but only to other officers. Id. at 157-58. Nevertheless, the Delaware Supreme Court had denied Mr. Franks an evidentiary hearing and an opportunity to prove his allegations of false statements. The United States Supreme Court reversed the Delaware court and remanded. The plain implication of the Franks decision, therefore, is that, if Mr. Franks was able to prove his allegations on remand, the evidence against him would have been suppressed.

an Investigator McCurley. Id. at 342. The Villemez court found, however, that McCurley's claim of personal knowledge "was a misstatement because the evidence at the suppression hearing showed that the informant actually told [another officer] and [the other officer] then relayed the information to McCurley by telephone." Id. at 343. The court concluded that "McCurley's failure to properly identify his source of information was at least reckless, if not intentional." Id. at 344. Finally, the court suppressed the evidence seized on the basis of the warrant because it was compelled to excise from the affidavit the information that McCurley had alleged he received directly from the informant. Id.

A similar analysis was performed by two different appellate courts in the State of Florida. In Florida v. Morrow, 459 So. 2d 321 (Fla. Dist. Ct. App.), review denied., 458 So.2d 274 (Fla. 1984), a police officer affiant submitted an affidavit for a search warrant which stated "your affiant received information from a reliable confidential informant." Id. at 322. "[I]n fact, the affiant never communicated with the alleged confidential informant, but had spoken only to a fellow police officer who told the affiant about the reliability of the confidential informant and the information which the informant gave." Id. The Florida Court of Appeals then held that the police officer's statements of personal knowledge were "at least recklessly false" and when the false statement were excised from the affidavit there were not sufficient facts in the affidavit to support a finding of probable cause. Id. See also, Florida v. Beney, 523 So2d 744 (Fla. Dist. Ct. App. 1988) (evidence suppressed where police officer affiant claimed he received information from "confidential reliable source" when, in fact, information was obtained from New Jersey police officer).[3]

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[3] Mr. XXXX's arguments in this case are also supported by United States v. Leon, 468 U.S. 897 (1984). The Supreme Court, in articulating the good faith exception to the Fourth Amendment, nevertheless recognized that "[s]uppression....remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information that the affiant knew was false

In light of the evidence presented at the suppression hearing and the established case law, it is clear that the evidence against Mr. XXXX should be suppressed. Officer Perez's statements to the Dallas County magistrate were at least recklessly false, if not intentionally false. It is clear from the testimony that Officer Perez chose to go to a Dallas County magistrate and to mislead that magistrate for the sake of expediency. Furthermore, when the Court excises Officer Perez's false statements from the affidavit it should be left with the same conclusion as the courts in Davis, Villemez, Morrow and Beney: the evidence seized must be suppressed.

B. KNOCK AND ANNOUNCE

As noted in Mr. XXXX's opening brief and in his reply brief, in order to conduct an unannounced entry (or in the words of Agent Gabourie a "dynamic entry" T 45:10) into a person's house there must be exigent circumstances. To prove exigent circumstances, the Government must make both a reasonable and articulable showing that evidence would be destroyed or that a defendant had a propensity for violence. See Brief in Support of Motion to Suppress pp. 5-10.[4]

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or would have known was false except for his reckless disregard of the truth." Id. at 925, citing, Franks, 428 U.S. 154.

[4] It is clear that the agents did not comply with the knock-and-announce rule in this case and, therefore, the Government must justify the agents' forceful entry by means of an exception to the knock-and-announce rule. Indeed, even if one accepts the agents' incredible testimony that they remembered that five months ago they waited "1-2-3" before entry, it would be ludicrous to contend that this constituted actual compliance with the rule when the agents knew it had taken Mr. XXXX almost one minute to answer the door when Officer Perez knocked (T 14:3-9; T 57:25; T 58:1-7)and when there were no sounds indicating Mr. XXXX was not complying with the agents' alleged knock.

In the instant case, all of the Government's witnesses testified that they heard no sounds consistent with a reasonable and articulable belief that evidence was being destroyed by Mr. XXXX. T 38:20-22; T 50:11-15; T 55:22-25. Likewise, all of the agents testified that they had no reasonable and articulable belief that Mr. XXXX was prone to violence that would have put them in jeopardy. T 9:16-21; T 13:19-24; T 26:16-18; T 27:7-12[5]. In fact, Officer Perez's initial

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The agents are seemingly under the mistaken impression that there is a per se exception to the knock and announce rule anytime a gun is the object of a search. See, e.g., T 28:8-17 (Agent Crowley would have acted in an identical fashion had Mr. XXXX been a little old lady with a hand gun). The agents must be deterred from acting inconsistent with the law and the United States Constitution. Indeed, suppression is often necessary to deter police misconduct. Mapp v. Ohio, 367 U.S. 643, 657 (1961)

[5] Moreover, any alleged exigency existed at the time the warrant was issued (T 49:16; T 50:5) and, therefore, it should have been up to the issuing magistrate to issue a no-knock warrant. United States v. Stewart, 867 F.2d 581, 584-585 (10th Cir.

encounter with Mr. XXXX speaks volumes as to how Mr. XXXX would have acted had the agents complied with 18 U.S.C./3109 and the Fourth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on the ____ day of December, 1992, I caused a copy of this Supplemental Brief in Support of Motion to Suppress Evidence to be hand-delivered to Joseph Revesz, Assistant United States Attorney, at 1100 Commerce Street, Room 16G28, Dallas, Texas 75242.

F. Clinton Broden